# FREEDOM OF INFORMATION AND PRIVACY ACTS

# SUBJECT: ROBERT F. KENNEDY ASSASSINATION

# LA FILE: 56-156

# SUB FILE Y VOLUME 1


# FEDERAL BUREAU OF INVESTIGATION

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Plaintiff's Response to Serbian Appeal Brief

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# INVESTIGATION

Bureau File Number 62-587

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Sec 1

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CRIM. NO. 14026

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. SIRHAN BISHARA SIRHAN, Defendant and Appellant. | ) |

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE HERBERT V. WALKER, JUDGE

# RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

In an indictment returned by the Grand Jury of Los Angeles County, appellant was charged in Count I with the murder of Robert Francis Kennedy in violation of Penal Code section 187. (Cl. Tr. p. 1.) In Counts II - VI appellant was charged with assault with a deadly weapon with intent to commit murder upon Paul Schrade, Irwin Stroll, William Weisel, Elizabeth Evans, and Ira Goldstein, respectively, in violation of Penal Code section 217. (Cl. Tr. pp. 2-6.)

At the arraignment of appellant, the court appointed doctors pursuant to Evidence Code sections 730 and 951-53 to examine appellant as to his mental

and physical condition and to advise appellant's counsel as to a possible plea or pleas and as to possible defenses. (Cl. Tr. pp. 9, 13.)

Appellant pleaded not guilty. (Cl. Tr. p. 49.) Appellant's motions for pretrial discovery were granted in part. (Cl. Tr. pp. 73, 98.) The court denied appellant's motion to suppress certain physical evidence obtained from his residence by means of a search and seizure. (Cl. Tr. p. 82.) Appellant's motion for separate juries on the issue of guilt and the possible issue of penalty was denied. (Cl. Tr. p. 143.) Appellant's motion to quash and set aside the petit jury list was denied (Cl. Tr. p. 148), as was his motion to quash the indictment. (Cl. Tr. p. 181.)

After a jury trial appellant was found guilty as charged on all counts, the jury fixing the degree of the offense charged in Count I at murder in the first degree. (Cl. Tr. pp. 322-23.) After further proceedings on the issue of penalty, the jury fixed the punishment on Count I at death. (Cl. Tr. p. 345.) Appellant's motion for new trial was denied, and probation was denied. Appellant was sentenced to death on Count I and to state prison on Counts II - VI for the term

prescribed by law, the sentences as to the latter counts to run concurrently with each other. (Cl. Tr. pp. 566-68.) Appellant filed notice of appeal from the judgment of conviction. (Cl. Tr. p. 570.) The appeal to this Court is automatic. Pen. Code § 1239(b). Upon motion of appellant, the trial court ordered the preparation of additional record on appeal. (Cl. Tr. pp. 572, 574.)

## STATEMENT OF FACTS

### A. Evidence Received on the Issue of Guilt

On August 10, 1965, James Pineda, an employee of the Pasadena Gun Shop, Inc., sold a .22 caliber Iver Johnson revolver, serial number H53725, to one Albert Hertz. (Rep. Tr. pp. 3682-87, 3690-92, 3740.) Sometime later that year, or in 1966, Hertz's wife came across the revolver in the course of moving the Hertzes' effects to a new apartment and asked her daughter, Dana Westlake, to dispose of it. (Rep. Tr. pp. 3739-41.) Instead Mrs. Westlake stored it in her attic and thereafter, sometime between October 1967 and January of 1968, gave it to George Erhard, a boy who lived next door and worked at Nash's

Department Store. (Rep. Tr. pp. 3743-48.)

During the latter part of January of 1968, Erhard spoke to a fellow employee, Munir Sirhan, about selling the weapon. Erhard and a friend, William Price, later met Munir and appellant, Munir's brother, on a street corner in Pasadena. Appellant asked to inspect the weapon. There was some dickering over the price, and eventually Munir obtained $6 from appellant and paid Erhard $25 for the weapon. The weapon was handed over to appellant. (Rep. Tr. pp. 3749-54, 3758-60.)

Thereafter appellant had a conversation with Alvin Clark, a trash collector employed by the City of Pasadena, in which appellant expressed his concern over the assassination of Martin Luther King, Jr., asked Mr. Clark "how the Negro people felt about it," and asked his opinion about the forthcoming elections. When Clark stated that he was going to vote for Senator Kennedy, appellant responded, "'What do you want to vote for that son-of-a-b for? Because I'm planning on shooting him.'" Clark told appellant that Senator Kennedy had paid the expenses of bringing Reverend King's body back from Tennessee and that "'You will be killing one of the best men in the country.'" Appellant replied that Senator Kennedy

had done so merely for the publicity involved. This conversation occurred about April of 1968.[1/] (Rep. Tr. pp. 4010-15.)

On June 1, 1968, appellant signed in on the roster at the Corona Police Pistol Range. (Rep. Tr. pp. 4261-65, 4346.)

On the evening of June 2, 1968, United States Senator Robert F. Kennedy made a speech at the Palm Terrace of the Ambassador Hotel in Los Angeles. (Rep. Tr. pp. 4032-34, 4043-44.) He had campaigned in the Los Angeles area during the month of April 1968 and portions of May, spending May 21-27 in Oregon and returning to the Los Angeles area the evening of May 27th. (Rep. Tr. pp. 8239-40.) Prior to the Senator's speech on the evening of June 2d, William Blume, who worked as a stock boy in a liquor store located next door to an organic health food store where appellant worked, observed appellant in the lobby area adjacent to the Palm Terrace. (Rep. Tr. pp. 4031-37.) Mrs. Miriam

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1/ The witness Clark was unable to specify the date of the conversation other than to indicate that he spoke with appellant "shortly after" and "n[o]t very long after" the assassination of Reverend King. (Rep. Tr. p. 4013.) This Court may take judicial notice of the fact that Reverend King's assassination occurred on April 4, 1968. Evid. Code §§ 451(f), 459. See World Almanac 74 (N.Y. ed. 1969).

Davis, a hostess for the event, was walking around the hotel with members of her family twenty or thirty minutes after the speech when she observed appellant seated in the kitchen area. (Rep. Tr. pp. 4042-49.) After his speech that night Senator Kennedy had passed through the kitchen area. (Rep. Tr. p. 4025.)

On the morning of June 4, 1968, election day, appellant signed in at the San Gabriel Valley Gun Club located on Fish Canyon Road in Duarte. He wrote the name "Sirhan Sirhan" and the address "696 East Howard Street, Pasadena" on the roster. (Rep. Tr. pp. 3567-70, 3574.) After appellant had fired a while on the shooting range, he told the range-master, Edward Buckner, "'I want the best box of shells you have, and I want some that will not misfire. I got to have some that will not misfire.'" Buckner sold appellant a box of shells, and appellant resumed shooting. Appellant engaged in rapid fire shooting, employing a .22 revolver and remaining two to two and a half hours at the range. (Rep. Tr. pp. 3567, 3571.)

Five other witnesses testified that they observed appellant engaged in rapid fire at the range that morning. Henry Carreon asked appellant what kind of weapon he was using, and appellant described his .22 revolver as an Iver Johnson. (Rep. Tr. pp.

3592-96.) Carreon noticed 300 or 400 empty casings on the stand where appellant was shooting. (Rep. Tr. pp. 3597-98.) David Montellano was told by appellant that the Mini-Mag ammunition being used by appellant would spread on impact. (Rep. Tr. p. 3628.) Mr. and Mrs. Ronald Williams conversed with appellant at the range. Appellant told Mrs. Williams that his Mini-Mag bullets were superior to the bullets she was using, and he instructed her in the firing of her weapon. (Rep. Tr. pp. 3644-45, 3656-59.) Michael Saccoman asked appellant why he was using Mini-Mag ammunition for target practice when that type was designed for hunting. Appellant replied that he did not know much about weapons and that he had been sold that ammunition at the Lock, Stock & Barrel gun shop (which is located in San Gabriel). (Rep. Tr. pp. 3667-70, 3762.) Appellant stated that he had purchased the weapon a few months earlier for $20 from a "friend . . . up north." Appellant further stated that he was going on a hunting trip with his gun. Saccoman said that "that was against the law because you are not allowed to use pistols for hunting"; appellant inquired why that was, and Saccoman replied that he believed "it is because of the accuracy." Appellant

responded, "'Well, I don't know about that. It could kill a dog.'" (Rep. Tr. pp. 3675-76.)

Later that day, it was decided by Senator Kennedy and his staff that after the Senator observed the election returns at his suite in the Ambassador Hotel, he would descend to the Embassy Ballroom to address the crowd assembled there. (Rep. Tr. pp. 3439-41.) An hour or two prior to Senator Kennedy's speech, Judy Royer, a member of his staff, observed appellant in the area to the rear of the Embassy Ballroom stage. Because appellant was not wearing a press badge or staff badge he was asked to leave, and he turned and walked toward the doors leading out to the Embassy Ballroom. (Rep. Tr. pp. 3912-18.)

Shortly before midnight the Senator took the service elevator down to the second floor kitchen area from which he walked to a pantry area located to the rear of the Embassy Ballroom. From there the Senator proceeded to the platform in the Embassy Ballroom where he delivered his victory address. (Rep. Tr. pp. 3439-42, 3905.)

Jesus Perez, a kitchen helper at the Ambassador Hotel, and Martin Petrusky, a waiter, observed Senator Kennedy as he passed through the pantry on the way to

the Embassy Ballroom where 1200-1500 persons awaited his speech. (Rep. Tr. pp. 3137, 3371, 3376, 3381-83.) The kitchen personnel observed appellant in the pantry. Appellant inquired whether Senator Kennedy would be "coming back through this way." The two hotel employees replied that they did not know. Appellant remained in the area of the pantry close to Perez at the corner of a serving table. (Rep. Tr. pp. 3374-75, 3384-85.)

Upon concluding his address at approximately 12:15 a.m. (June 5th), Senator Kennedy was escorted off the platform and toward the Colonial Room where he was to meet the press. Karl Uecker, assistant maitre d' at the Ambassador Hotel, led the Senator through the pantry area behind the Embassy Ballroom. (Rep. Tr. pp. 3076, 3087-90, 3448-49, 3916.)

In the pantry area Senator Kennedy stopped and shook hands with some of the kitchen help, including Perez and Petrusky. At that time appellant appeared, smirking, and began to fire the aforementioned .22 caliber revolver at the Senator. Several shots were fired in rapid succession as appellant's fire emptied the weapon. Uecker attempted to wrest the weapon from appellant, and Senator Kennedy fell to the floor of the pantry. (Rep. Tr. pp. 3093-3100, 3104, 3155-56,

3197, 3215, 3377-79, 3386-88, 3399.)

A struggle ensued as those present attempted to immobilize and disarm appellant. Roosevelt Grier, Rafer Johnson, George Plimpton, Jesse Unruh, and other members of Senator Kennedy's entourage arrived seconds later. (Rep. Tr. pp. 3101-03, 3105-09, 3121-24.) Mr. Grier, a former defense tackle for the Los Angeles Rams, kept appellant immobile on top of a serving table, took the revolver from appellant's hand, and handed the weapon to Mr. Johnson. (Rep. Tr. pp. 3311-16.) Later that night Mr. Johnson turned the weapon over to the police, and it was booked into the property division. (Rep. Tr. pp. 3478-80, 3695-96.)

Someone placed a coat beneath Senator Kennedy's head, from which he was bleeding. (Rep. Tr. pp. 3191-92.)

While appellant was being held, Mr. Johnson asked him repeatedly, "'Why did you do it?'" Appellant replied, "'Let me explain'" or "'I can explain.'" Apparently at this time appellant also remarked, "'I did it for my country,'" and -- in response to Mr. Unruh's question "'Why him?'" -- responded, "'It is too late.'" (Rep. Tr. pp. 3165, 3280-84, 3290-92.)

Some of the persons present were attempting

to injure or kill appellant. (Rep. Tr. p. 3218.) Mr. Unruh, having in mind the murder of President Kennedy's assassin, got up on a table and told those present, "'Don't kill him, don't kill him, we have got to keep him alive.'" (Rep. Tr. pp. 3274-75.)

As a result of the shots fired by appellant, several other individuals were wounded: Paul Schrade (Rep. Tr. pp. 3711-15), Irwin Stroll (Rep. Tr. pp. 3984-87), William Weisel (Rep. Tr. pp. 4003-07), Elizabeth Evans (Rep. Tr. pp. 3932-35), and Ira Goldstein (Rep. Tr. pp. 3940-43). (These incidents form the basis, respectively, for Counts II-VI of the indictment, each of which charged appellant with assault with a deadly weapon with intent to commit murder. (Cl. Tr. pp. 2-6.))

Dr. Stanley Abo, a physician summoned from the crowd at the Embassy Ballroom, examined Senator Kennedy. The Senator was lying very still, his left eye closed and his right eye open and staring aimlessly. His pulse was strong but slow. Dr. Abo's examination revealed a small but penetrating wound behind the Senator's right ear. Mrs. Kennedy also arrived at the scene and tended to the Senator. (Rep. Tr. pp. 4091-93, 4097-99.) Dr. Abo remained with him until

an ambulance arrived 15-20 minutes later. The doctor then tended to some of the other victims. (Rep. Tr. pp. 4101-03.)

Two Los Angeles police officers on patrol duty, Arthur Placentia and Travis White, answered the 12:20 a.m. all-units call, "Ambulance shooting, 3400 Wilshire." (Rep. Tr. pp. 3482-84, 3533.) The officers took appellant off the serving table, where he was being restrained, placed him in custody, and handcuffed him. Appellant was transported through a hostile crowd, which was chanting "'Kill him, kill him,'" to the officers' police car. (Rep. Tr. pp. 3491-95, 3534-35.) Mr. Unruh also entered the vehicle, and the officers drove toward the Rampart station. (Rep. Tr. pp. 3277-80, 3495-98.) Officer Placentia several times asked appellant his name, but he did not reply. Appellant was advised of his constitutional rights. (Rep. Tr. pp. 3497, 3499-3501.) Appellant replied that he understood his rights. (Rep. Tr. pp. 3500, 3535.)

The officers did not address any further questions to appellant during the trip to the station. (Rep. Tr. pp. 3501-02.) Mr. Unruh asked appellant "'Why did you shoot him?'", and appellant replied, "'Do you think I'm crazy, so you can use it in evidence

against me.'" (Rep. Tr. pp. 3502-03, 3561.)

It was only during the course of the five-minute drive to the station that the officers learned that one of the victims was Senator Kennedy and that the other person in the police vehicle was Mr. Unruh. (Rep. Tr. pp. 3497-98, 3503-04, 3817, 3834.) Officer Placentia attempted to examine appellant's eyes but did not form an opinion whether appellant was under the influence of alcohol or drugs. (Rep. Tr. pp. 3541, 3554, 3557-58.) He did not smell any odor of alcohol on appellant. (Rep. Tr. pp. 3555-56.) Nor did appellant appear to Mr. Unruh to be under the influence of intoxicating liquor. (Rep. Tr. pp. 3296-97.)

Upon their arrival at the Rampart station, the officers placed appellant in an interrogation room. (Rep. Tr. pp. 3284, 3293, 3504-05.) Within three or four minutes after their arrival, appellant's eyes were subjected to a light test. On the basis of the test, as well as appellant's appearance and movements, Officer White formed the opinion that appellant was not under the influence of alcohol or drugs. (Rep. Tr. pp. 3821-25.)

Appellant's pockets were emptied and the

following items taken from his possession: an automobile key, two live .22 caliber bullets and an expended bullet, two newspaper clippings, a printed verse, and $410.66 in cash (including four $100 bills). (Rep. Tr. pp. 3506, 3508-11, 3516-22.) No wallet, identification, or information indicating appellant's identity was obtained from the examination of appellant's person. (Rep. Tr. pp. 3522-23.)

One of the newspaper articles, clipped from the Pasadena Independent Star News and dated May 26, 1968, was a story by columnist David Lawrence (Rep. Tr. pp. 3526-30, 8039) which in part noted that in a recent speech Senator Kennedy had "'favored aid to Israel "with arms if necessary."'" (Rep. Tr. p. 3529.) The other newspaper clipping was an advertisement from an unidentified newspaper inviting the public "'to come to see and hear Senator Robert Kennedy on Sunday, June 2, 1968, at 8:00 p.m., Cocoanut Grove, Ambassador Hotel, Los Angeles.'" (Rep. Tr. p. 3531.) The printed verse was a Senator Kennedy campaign song entitled, "'This Man is Your Man, This Man is My Man.'" (Rep. Tr. p. 3530.)

Sergeant William Jordan, who was Watch Commander at Rampart Detectives that night, assumed custody over

appellant at approximately 12:45 a.m. in one of the interrogation rooms of the station. (Rep. Tr. pp. 4407-08, 4415-17.) Sergeant Jordan introduced himself, told appellant where he was, and asked him his name. Receiving no response, the officer informed appellant of his constitutional rights. Appellant asked some questions about his rights and requested that the admonition be repeated, which was done. At this point appellant indicated that he wished to remain silent. This terminated the conversation. (Rep. Tr. pp. 4417-20.)

The property previously removed from appellant's pockets was then inventoried in his presence, and appellant's person was searched more thoroughly. (Rep. Tr. pp. 4422-25.) At this time appellant was able to identify an absent officer to Sergeant Jordan by the officer's badge number, 3949. (Rep. Tr. p. 5951.) Sergeant Jordan formed the opinion at this time that appellant was not under the influence of either alcohol or drugs. (Rep. Tr. pp. 4425-27.) Appellant was not given an intoxication test because Sergeant Jordan concluded there were no objective symptoms of intoxication and no reason to administer such a test. (Rep. Tr. p. 4472.) Sergeant Jordan ascertained that

appellant's left ankle had been injured. (Rep. Tr. pp. 4423-24.) When Sergeant Jordan offered appellant a cup of coffee, appellant asked the officer to drink from the cup first, and the officer did so. (Rep. Tr. pp. 4430-31.)

For security reasons appellant was transported to police headquarters at Parker Center, arriving at the homicide squad room there at 1:35 or 1:40 a.m. (Rep. Tr. pp. 4429-33.) Appellant requested some water and, again at his request, Sergeant Jordan tasted it before passing the cup to him. (Rep. Tr. pp. 4434-35.) Shortly before 2:00 a.m. a Dr. Lanz examined appellant in those areas where appellant complained of pain. Appellant refused to tell the physician his name. The physician informed the officers present that appellant was not in need of any immediate medical treatment but that appellant should keep as much weight as possible off his left ankle since it was probably sprained. (Rep. Tr. pp. 4435-38.)

About this time Mr. Compton and Mr. Howard of the district attorney's legal staff arrived, as did members of the district attorney's investigative staff. (Rep. Tr. p. 4438.) Appellant was moved to an interrogation room, where Mr. Howard asked him his

name. Appellant did not answer and was then advised by Mr. Howard of his constitutional rights. Appellant nodded in the direction of Sergeant Jordan and stated, "'I will stand by my original decision to remain silent.'" Mr. Howard then gave appellant a card on which was written Mr. Howard's name, and that of Sergeant Jordan and a Sergeant Melendrez, with telephone numbers where they could be reached in the event appellant chose to speak to any of them at any time. (Rep. Tr. pp. 4439-40.) Appellant was then booked at approximately 2:15 a.m. (Rep. Tr. p. 4441.)

At 3:15 a.m. appellant was brought to an interrogation room in the jail section of Parker Center. (Rep. Tr. pp. 4441-42.) Asked whether he wished something to eat or drink, appellant requested a cup of coffee, again succeeding in having Sergeant Jordan first taste the coffee. (Rep. Tr. p. 4443.) Appellant was interviewed from 3:15 to 3:45 a.m. by Mr. Howard, Sergeant Jordan, and Sergeant Melendrez, and from 4:00 a.m. to approximately 5:15 a.m. by Sergeant Jordan and George Murphy, an investigator from the district attorney's office. (Rep. Tr. pp. 4444-46.)

During Sergeant Jordan's various contacts with appellant, including the four to five hours he

spent with him at the arraignment and immediately prior and subsequent thereto, appellant never appeared irrational. While refusing to identify himself by name or place of origin, appellant engaged in banter regarding the officer's name, "Jordan." Sergeant Jordan formed the opinion that appellant had a "very quick mind" and that appellant was "one of the most alert and intelligent" persons the officer had ever interrogated or attempted to interrogate during his fifteen years' experience on the police force. (Rep. Tr. pp. 4446-48, 6104, 6108-09.)

Upon his arrival at Central Receiving Hospital that night, Senator Kennedy had been totally inert and was not breathing, although he did have an oxygen mask over his face. Dr. V. Faustin Bazilauskas, the attending physician, felt no heartbeat and administered an external cardiac massage. (Rep. Tr. pp. 4483, 4486-87, 4490.) Senator Kennedy's breathing, pulse, and heartbeat resumed within a few minutes. (Rep. Tr. pp. 4492-93.) After an adrenalin injection the Senator's condition rapidly improved. (Rep. Tr. p. 4495.) The medical staff then began to attend also to the five other victims. (Rep. Tr. pp. 4497-98.) Half an hour after Senator Kennedy's arrival at the emergency hospital, his condition had

stabilized sufficiently to permit his transportation to Good Samaritan Hospital, two blocks away, where he could be examined by a neurosurgeon and chest surgeon. (Rep. Tr. pp. 4483, 4499-4503.)

Upon his arrival at Good Samaritan Hospital, Senator Kennedy was still in "extremely critical condition" and was placed in the intensive care unit, where a tracheotomy was performed. (Rep. Tr. pp. 4231, 4234-36.) Surgery was performed between 3:10 a.m. and 6:20 a.m. "because there was still evidence of bleeding intercranially; there was blood oozing from the wound in the mastoid region of the skull; there was blood mingled with spinal fluid leaking out of the right ear." (Rep. Tr. p. 4238.) The concern of the head of the surgical team, Dr. Henry Cuneo, was "that it might be a blood clot or some large vessel might have macerated." (Rep. Tr. pp. 4236, 4238.) The surgery stopped all the bleeding and removed bone and metallic fragments and a blood clot. Thereafter Senator Kennedy began to breathe on his own without any assistance. (Rep. Tr. pp. 4238-39.)

Dr. Cuneo remained with Senator Kennedy thereafter, until the Senator's death at 1:44 a.m. on the following day, June 6, 1968. (Rep. Tr. p.

4239.)

An autopsy was performed on Senator Kennedy's body by Thomas Noguchi, Coroner and Chief Medical Examiner of Los Angeles County, and two deputy medical examiners between 3:00 a.m. and 9:15 a.m. on June 6th. It disclosed that the gunshot wound to the head, in the right mastoid, had penetrated the brain and was the cause of death. (Rep. Tr. pp. 4507-09, 4517, 4524.) The bullet had fractured the skull and had then itself shattered. (Rep. Tr. p. 4525.) Powder burns on the right ear indicated that the muzzle distance between the weapon and the ear at the time of the firing was one to one and a half inches. (Rep. Tr. pp. 4518-20.) The only other two gunshot wounds were in the area of the right armpit and the right side. These shots were fired at very close range, between contact and one half to one inch. (Rep. Tr. pp. 4521, 4523-24.) The location, alignment, and direction of the three wounds, in conjunction with the clothing worn, indicated to Dr. Noguchi that the three shots in question were fired in "rapid succession." (Rep. Tr. pp. 4531-33.)

At approximately 9:30 a.m. on June 5th (after the shooting of Senator Kennedy but before his death),

Sergeant William Brandt of the Los Angeles Police Department met with Adel Sirhan, one of appellant's brothers, at the Pasadena Police Station. At the conclusion of the conversation between Sergeant Brandt and Adel concerning appellant and the shooting of Senator Kennedy, Adel stated that he lived with his two younger brothers, Munir and appellant, and their mother at 696 Howard Street in Pasadena. (Rep. Tr. pp. 4268-72.) Thereafter Adel and Sergeant Brandt proceeded to the Sirhan residence accompanied by Sergeant James Evans of the Homicide Division, Los Angeles Police Department, and an Agent Sullivan of the F.B.I. (Rep. Tr. p. 4272.)

Adel admitted the officers to the house upon arriving with them at approximately 10:30 a.m. (Rep. Tr. p. 4273.) No one else was home at the time. (Rep. Tr. p. 4309.) The officers did not have a search warrant and had not made an attempt to secure the consent of appellant to enter and search. Their purpose in going to the Sirhan residence was "[t]o determine whether or not there was anyone else involved" in the shooting and also "to determine whether or not there were any other things that would be relative to the crime." (Rep. Tr. pp. 4274-75.) Sergeant Brandt knew "that there was a continuing investigation to

determine if there were other suspects." (Rep. Tr. p. 4313.)

Adel, whom the officers knew to be the oldest male resident of the household, gave them permission to search appellant's bedroom. (Rep. Tr. pp. 4313-14.) He showed them where the bedroom was located, at the rear of the residence. Sergeant Brandt then searched the bedroom in the presence of the other officers and Adel. (Rep. Tr. pp. 4273, 4278, 4309.)

Three notebooks were recovered from this bedroom. One was observed on a corner of the dressing table in plain view from the entrance to the room. (Rep. Tr. pp. 4281-83, 4300-03.) A second notebook was observed by Sergeant Evans in plain view on the floor at the foot of the bed next to a cardboard box filled with clothes. (Rep. Tr. pp. 4282, 4320.) Sergeant Brandt obtained a third notebook and an envelope on which there was writing, as well as the return address "U.S. Treasury, Internal Revenue," from the drawer of the dressing table. This third notebook was never put in evidence by either party. (Rep. Tr. pp. 4303-05, 4310, 4349.)

That evening Lieutenant Alvin Hegge of the Los Angeles Police Department employed the automobile

key, which had been taken from appellant's pocket at the Rampart station, in a successful attempt to operate the lock on a door of a 1956 DeSoto parked in the vicinity of the Ambassador Hotel. (Rep. Tr. pp. 4060-62.)

On the basis of this successful attempt Lieutenant Hegge applied for and obtained the issuance of a warrant to search the vehicle in question. (Rep. Tr. pp. 4062-64.) Lieutenant Hegge returned to the location of the vehicle at approximately 12:30 a.m. (June 6th) and conducted a search. (Rep. Tr. pp. 4069-70.) The following items were recovered: (1) from inside the glove compartment, a wallet containing among other items a current membership card in appellant's name in the Ancient Mystical Order of Rosae Crucis, as well as other cards identifying appellant by name and address (Rep. Tr. pp. 4070-76); (2) from inside the glove compartment, a business card from the Lock Stock & Barrel gun shop (located in San Gabriel) and a receipt dated June 1, 1968, from that establishment for the purchase of two boxes of Mini-Mag hollow point .22 caliber ammunition and two boxes of Super X .22 caliber ammunition (a total of 200 bullets) (Rep. Tr. pp. 3762-65, 4070, 4076-77, 4080); (3) from inside

the glove compartment one live round of .22 caliber ammunition and an empty carton labeled .22 caliber Mini-Mag, and on the right front seat two spent bullets (Rep. Tr. pp. 4070, 4077-81); and (4) a Canadian dollar bill and an envelope containing a ring with six keys. (Rep. Tr. pp. 4088-90.)

Police fingerprint specialists obtained latent fingerprints that night from the glove compartment and from the Lock Stock & Barrel ammunition receipt and determined that the fingerprints were made by appellant. (Rep. Tr. pp. 3869-70, 3874, 3876-77, 3881, 3888, 3896-97.)

At 8:00 a.m. on the morning of June 6th, Officer Thomas Young of the Pasadena Police Department arrived at the Sirhan residence, having been "assigned to security at the rear of the residence." His duty was to guard the premises from unauthorized persons. At approximately 11:00 a.m., upon discarding a paper cup of coffee into the trash which lay inside several boxes and cans of trash and garbage in a "rear yard to the rear of the residence," he observed an envelope which bore on its face the return address of the Argonaut Insurance Company. The trash area was located on the Sirhan property. Officer Young retained

possession of the envelope and brought it to the police station. (Rep. Tr. pp. 4326-29, 4332-34.)

Mr. Laurence Sloan, employed by the district attorney's office as a specialist in handwriting and questioned documents, determined that it was appellant who had placed the signature "Sirhan Sirhan" on the June 1, 1968, roster at the Corona Pistol Range (Rep. Tr. pp. 4261-65, 6346), and that it was appellant who had placed the same signature and appellant's address on the June 4, 1968, roster of the San Gabriel Valley Gun Club range. (Rep. Tr. pp. 4347-48.)

Mr. Sloan also determined that it was appellant who had placed the following words (repeated several times) on the reverse side of the envelope, put in evidence by the prosecution, which was recovered from the trash area at the rear of the Sirhan residence (Rep. Tr. pp. 4350, 4404): "RFK must be . . . disposed of properly. Robert Fitzgerald Kennedy must soon die." (See Exh. 75, received in evidence at Rep. Tr. p. 4359.) The following handwriting on the envelope, put in evidence by the prosecution and recovered from appellant's dresser drawer, was also determined by Mr. Sloan to be appellant's (Rep. Tr. pp. 4349-50, 4404): "RFK must be disposed of like his brother was"

-- and the word "reactionary." (See Exh. 74, received in evidence at Rep. Tr. p. 4360.)

The prosecution put in evidence (at Reporter's Transcript page 4363) eight pages (four sheets) of the diary found on top of appellant's dresser, which pages Mr. Sloan identified as having been written by appellant. (Rep. Tr. pp. 4353-54, 4363, 4380.) These pages read in part as follows:

> "May 18 9:45 AM--68 / My determination to eliminate R.F.K. is becoming more the more [sic] of an unshakable obsession . . . RFK must die RFK must be killed . . . Robert F Kennedy must be assassinated before 5 June 68 . . ." (see Exh. 71-15 & 16);
>
> "The socalled [sic] president of the United States of America must be advised of their punishments for their treasonable crimes against the the [sic] State more over [sic] we believe that the glorious United States of America will eventually be felled by a blow of an assassins [sic] bullet . . ."
>
> "[L]ong live Socialism" (see Exh. 71-35 & 36);
>
> "Ambassador Goldberg must die . . . Ambassador Goldberg must be eliminated . . . Sirhan is an

Arab " (see Exh. 71-39 & 40);

"Kennedy must fall Kennedy must fall . . . . Senator R. Kennedy must be disposed of We believe that Robert F. Kenedy [sic] must be sacrificed for the cause of the poor exploited people We believe that we can effect such action and produce such results -- the hand that is writing doing this writing is going to do the slaying of the above mentioned victim One wonders what it feels like to do any assassination that might be some illegal work -- . . . ." (Emphasis in the original.) (See Exh. 71-47 & 48.)

Also put in evidence (at Reporter's Transcript page 4373) were two pages (one sheet) of the diary found on the floor at the foot of appellant's bed, which pages Mr. Sloan identified as having been written by appellant. (Rep. Tr. pp. 4353-54, 4371-73.) These pages read in part as follows:

"Well, my solution to this type of government that is to do away with its leaders -- and declare anarchy, the best form of govt [sic] -- or no govt [sic]. ~~I contend that what is more democratic than to shoot a president~~ The President elect is your best

friend until he gets in power they [sic] he is your-most-exploing [sic] fucker suck every on drop of blood out of you -- just and if he doesn't like you -- you're dead --" (Words stricken out in the original.) (See Exh. 72-125 & 126.)

Documents obtained from the California Department of Motor Vehicles established that appellant was the registered owner of the DeSoto searched in the vicinity of the Ambassador Hotel. (Rep. Tr. p. 4406.)

De Wayne Wolfer, a criminalist and ballistics expert assigned to the crime laboratory of the Los Angeles Police Department's Scientific Investigation Division, examined various bullets and bullet fragments. He found some to be so distorted as to preclude comparison but was able to conclude that bullets removed from Senator Kennedy, Ira Goldstein, and William Weisel were all Mini-Mag ammunition fired from the .22 caliber revolver previously identified as belonging to appellant. (Rep. Tr. pp. 4128-29, 4160-65.) These Mini-Mag bullets were hollow-point ammunition, and the purpose of using such ammunition is to "make a bigger hole." (Rep. Tr. pp. 4182-83.) Ballistics tests established that

the revolver was fired one inch from Senator Kennedy's right ear and that the remaining shots which entered Senator Kennedy's body were fired at a distance of one inch to six inches. (Rep. Tr. pp. 4180, 4193-94.)

B. Evidence Received at the Hearing Under Penal Code Section 1538.5 on the Motion to Suppress Evidence Obtained During the Search of the Sirhan Residence

In addition to the foregoing evidence received in the jury's presence relative to the search of the Sirhan residence, other testimony on this matter was received prior to the commencement of the trial at the hearing on the motion to suppress evidence under Penal Code section 1538.5.

Sergeant William Brandt and Officer Dante Lodolo, both of the Los Angeles Police Department, testified that they arrived at the Pasadena Police Station at approximately 9:15 - 9:30 a.m. on June 5, 1968, "to interview a person [who] possibly could name the identity of the person who shot Senator Kennedy," who was still alive at the time. They had a conversation with Adel Sirhan. Also present was F.B.I. Agent Sullivan. (Rep. Tr. pp. 54-56, 59, 90-91.) The officers

identified themselves and asked for Adel's identification. Adel gave his name, was advised of his constitutional rights, and agreed to speak to the officers. (Rep. Tr. pp. 57-58, 91-92.)

Adel informed the officers that he was the eldest of the brothers living at the Sirhan residence at 696 East Howard in Pasadena, that his mother and two younger brothers, appellant and Munir, were part of the household, and that his father was in a foreign country. Adel "probably" told the officers his age. (Rep. Tr. pp. 59-60, 64, 92.)

Adel stated his belief that appellant was involved in the shooting of Senator Kennedy. Adel formed the conclusion on the basis of what his younger brother Munir had told him, but the officers did not recall whether Adel stated he had seen appellant's picture in the newspaper in connection with the incident. (Rep. Tr. pp. 59-60, 92.) Up to this time the identity of Senator Kennedy's assailant was unknown. (Rep. Tr. pp. 94-95.)

When asked whether the officers "could search the home," Adel replied that "as far as he was concerned [the officers] could, however it was his mother's house." The officers then asked Adel whether "he would call his

mother for permission and he indicated he would prefer that [they] did not talk to his mother at that time;" she was at work, and "he did not want [the officers] to alarm her with what had happened because she did not yet know about it." (Rep. Tr. pp. 61, 93.)

Sergeant Brandt was advised by telephone, by Lieutenant Hughes of Rampart Detectives, that the Sirhan residence should be searched in the event Adel had given his consent. (Rep. Tr. pp. 61-62.) Munir had also given his consent that morning at the police station to a search of the Sirhan residence after having been advised of his constitutional rights. (Rep. Tr. pp. 62, 98-100.)

Adel accompanied the officers to the Sirhan residence at their request and upon their arrival unlocked the door and let them in. (Rep. Tr. pp. 62-63.) No one was inside the house when they arrived. (Rep. Tr. p. 87.) At the officers' request, Adel directed them to appellant's bedroom located at the rear of the residence. Adel entered the bedroom and remained there during part of the time in which the officers conducted their search of appellant's bedroom, which took approximately half an hour. (Rep. Tr. pp. 64, 75.)

The three diaries and the envelope with the

Treasury Department return address were recovered in the bedroom in the various locations previously indicated by the trial testimony. (Rep. Tr. pp. 65-71.) Other objects recovered in the course of the search (Rep. Tr. pp. 71-75) were not offered in evidence at the trial.

Adel never asked for a list of the items which the officers planned to remove from appellant's bedroom. (Rep. Tr. pp. 78-79.) Nor did Adel ever tell Sergeant Brandt that he (Adel) had no right to give the police permission to enter the house. (Rep. Tr. p. 80.)

At the time he conducted the search, Sergeant Brandt believed that Adel was a person authorized to consent to a search of the Sirhan residence. Sergeant Brandt and the other officers "were interested in evidence of possible conspiracy in that there might be other people that were not yet in custody." Only several hours had passed since the shooting of Senator Kennedy, and the officers "were looking for leads or other possible suspects." (Rep. Tr. pp. 75-77.)

Adel Sirhan testified at the hearing that he had gone to the Pasadena Police Station shortly after he and Munir had seen appellant's picture in

the newspaper in conjunction with the shooting of Senator Kennedy. (Rep. Tr. pp. 103-04.) Adel was advised of his constitutional rights. (Rep. Tr. pp. 107-08.) When asked whether the officers could search the Sirhan residence, Adel replied, "'I have nothing to hide, but the house isn't mine, I do not own the house.'" Adel said that his mother owned the house, that she knew nothing about the matter, and that he did not "want her disturbed" at work. Adel told the officers "I had no objection" to the house being searched and that "'It is okay with me,'" and he said nothing further on the subject. (Rep. Tr. pp. 105-06, 108-09.) Sergeant Brandt never told Adel that he would be given a list of items removed from the house, nor did Adel ever request such a list. (Rep. Tr. p. 110.)

Appellant's mother, Mrs. Mary Sirhan, testified that the Sirhan residence consisted of three bedrooms, a living room, a den, and a dining room. Mrs. Sirhan owned the house and had a deed to it. (Rep. Tr. p. 112.) Adel was a part owner of the property until August of 1963, when he and his mother joined in deeding the property to Mrs. Sirhan as sole owner. (Rep. Tr. p. 127.) Mrs. Sirhan had never given Adel or anyone

else permission to permit police officers to search any room of the house. At the time of the search Mrs. Sirhan was working at the Westminster Nursery School. Between 12:00 and 1:00 p.m. on June 5th, after Mrs. Sirhan apparently had learned of appellant's involvement in the shooting of Senator Kennedy, she was taken elsewhere by friends and remained with them eight to ten days. (Rep. Tr. p. 113.) Mrs. Sirhan testified that Adel was born in October of 1938 (i.e., was 29 years of age at the time of the search). (Rep. Tr. p. 114.)

Munir testified that he was 21 years of age, that he never gave the officers permission to enter his (Munir's) room, and that his mother had never given him "permission to extend permission to anybody to search any room in that house." (Rep. Tr. pp. 119-20.) Munir testified that he was advised of his constitutional rights at the Pasadena Police Station but denied having been asked for permission to search the house or having been asked whether he had any objection to such a search. (Rep. Tr. pp. 121-25.)

It was stipulated that at the time the search of the Sirhan residence was conducted, appellant "had

not identified himself to the officers or given his address or any identifying information and therefore had not consented to the search of the house." (Rep. Tr. pp. 115-16.)

Sergeant Gordon Harrison of the Los Angeles Police Department testified in rebuttal at the hearing that when Munir was asked whether he would object to a search of the Sirhan residence, Munir replied that no one was at the house and said, "'I don't have anything to hide, go right ahead and search.'" (Rep. Tr. pp. 130-31.)

DEFENSE

A. Appellant's Background, and the Events of June 1968

Baron Serkees Nahas, a writer and student of international law who had experience with the United States Information Service and the United Nations in the Middle East, testified regarding the adverse living conditions in Jerusalem during the hostilities that took place in Palestine between 1946 and 1957. (Rep. Tr. pp. 4576-87.) So did Ziad Hashimeh, an old friend of the Sirhan family. (Rep. Tr. pp. 4591-97.) Mr. Hashimeh also described the crowded living

quarters and impoverished way of life of the Sirhans. (Rep. Tr. pp. 4597-4611.) On one occasion during the bombing, appellant was terrified by the sight of a human arm in a well where the family obtained its water supply. (Rep. Tr. pp. 4612-15.) Appellant's father would often strike Mrs. Sirhan and appellant with sticks and his hands. (Rep. Tr. pp. 4616-17.) Appellant was "a very sensitive human being" and once advised Mr. Hashimeh that it "'is not nice'" to steal from an ice cream vendor. (Rep. Tr. pp. 4618-20.) Appellant also encouraged Mr. Hashimeh to take religious instruction and not to lie. (Rep. Tr. pp. 4620-21.) Mr. Hashimeh had not seen appellant from the day he left the Middle East in 1956 to the day of Hashimeh's testimony in the present proceedings. (Rep. Tr. pp. 4621-22.)

Appellant's mother testified that he was born in March of 1944 in Jerusalem and that her family had lived in that city for generations. (Rep. Tr. pp. 4664-65.) She testified that prior to appellant's birth, her family was prosperous and her husband was gainfully employed with the municipal water supply system. (Rep. Tr. pp. 4722-25.) However, with the outbreak of Arab-Israeli hostilities in Jerusalem

during the period of appellant's childhood, the family lived as refugees with little food and poor housing. (Rep. Tr. pp. 4677, 4680-89, 4718-19.) Appellant witnessed, and was visibly shaken by, various incidents of bombing and shooting because for a time the Sirhan family lived right at the dividing line between the Arab and Zionist sectors. (Rep. Tr. pp. 4694-96, 4701-09, 4713-14, 4717-18, 4728-29.) During this period appellant was very much affected by the death of an older brother who was run over by a truck. (Rep. Tr. pp. 4697-4700.) As the result of these various incidents, appellant became "fearful of the Zionists." (Rep. Tr. p. 4718.) In 1956, when President Eisenhower granted permission to 2000 refugee families to emigrate to the United States, Mr. and Mrs. Sirhan and their children came to New York, thereafter settling in Pasadena. (Rep. Tr. pp. 4712-13.)

Adel Sirhan, appellant's older brother, testified in basically similar fashion regarding the Sirhan family's life in Jerusalem. (Rep. Tr. pp. 4750-55.) Adel noted on cross-examination, however, that a demilitarized zone was established at the dividing line between the Arab and Zionist quarters (Rep. Tr. pp. 4768-70) and that appellant was able to attend school daily,

obtaining a good education which enabled him to enter junior high school in the foreign environment of Pasadena and do "at least average work" there. (Rep. Tr. pp. 4775-76.) When it had come time for the Sirhan family to leave Jerusalem, appellant had not wanted to do so. (Rep. Tr. pp. 4780-82.)

Adel also testified that he observed "[a] little nervousness" on the part of appellant after appellant's fall from a horse in 1966. After the fall appellant did not attend school, spent a great deal of time in his room talking to himself, sometimes with candles lit, and read books on American and Arab literature, Gandhi, and "the occult." (Rep. Tr. pp. 4755-58.) Appellant was scholarly and followed through with subjects that interested him. During the period appellant talked to himself, he was studying Russian, German, and Chinese.[2/] (Rep. Tr. pp. 4782-83.)

When watching television coverage of the current Arab-Israeli conflict, appellant became angry "[s]ince it was favorable to the Israeli side most of

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2/ Appellant's study of these three foreign languages is also evidenced by the portions of the diaries put in evidence by the defense. See Exhs. 71 & 72 (remaining portions received in evidence at Rep. Tr. pp. 4955, 5191).

the time." (Rep. Tr. pp. 4761-62.) On one occasion Adel observed a fight between appellant and his brother Munir. (Rep. Tr. pp. 4785-86.)

The defense put into evidence appellant's report cards from his years in junior high school and high school in Pasadena. (Rep. Tr. pp. 4625-39.) Appellant received his high school diploma in June of 1963. He was a "slightly better" than average student. (Rep. Tr. p. 4639.) Although he scored somewhat subnormally on most of the tests that were administered to him while he was in school, the fact that he was a foreigner recently arrived in this country could account for his being below par. (Rep. Tr. pp. 4639-44, 4655-57.) So could appellant's lack of facility with the English language. Appellant was in no way a "special problem" student. (Rep. Tr. pp. 4660-62.)

Also received in evidence was appellant's scholastic record during the two years he spent at Pasadena City College. Appellant's grades were poor, and he was ultimately dismissed in May of 1965. (Rep. Tr. pp. 4787-95.) This dismissal was occasioned mainly by appellant's poor attendance record. (Rep. Tr. pp. 4799-4802.) Appellant's scores on various aptitude tests administered when he entered college ranged from

poor to normal. (Rep. Tr. pp. 4796-98.)

On September 25, 1966, Mr. Millard Sheets observed an accident which appellant had while riding a race horse as an exercise boy. Appellant was "very well messed up"; his face was bloody, and initially he was unconscious. (Rep. Tr. pp. 5416-22.) However, Mr. Sheets observed appellant walking a horse two days later. Appellant "appeared to be in very good condition except for the scratches on his face." Appellant was not allowed to ride again for several days. (Rep. Tr. pp. 5424-25.) In Mr. Sheets' opinion, appellant was inexperienced with horses and appeared to be "extremely timid" around them. (Rep. Tr. p. 5423.)

Robert Prestwood, a race horse owner, knew appellant in 1966. Appellant was an exercise boy who rode Prestwood's horse for breaking and training. Appellant had desired to become a jockey but told Mr. Prestwood in January of 1967 that he had to quit racing because of an accident. (Rep. Tr. pp. 5374-80.)

Mr. and Mrs. John Strathman, who knew appellant from Pasadena City College, testified that he appeared to become depressed and nervous after the

accident and had trouble with one of his eyes. However, he did not become more violent or more emotional. Appellant did develop an interest in mysticism after the accident. (Rep. Tr. pp. 5385-89, 5409-13.) Appellant also told Mr. Strathman that "school wasn't quick enough" and that "success should be achieved more quickly than by going through the laborious process of getting it out of books." (Rep. Tr. p. 5396.)

Mr. and Mrs. John Weidner, the owners of a health food store in Pasadena, knew Mrs. Sirhan as a customer and friend and at her request hired appellant as a box boy and delivery boy. Appellant worked there from September of 1967 to March of 1968. (Rep. Tr. pp. 5427-30, 5447-48.) When paid every Sunday, appellant would place his wages in his wallet. (Rep. Tr. p. 5443.) The Weidners had discussions with appellant on the subject of politics in which appellant asserted that violence was the only means by which American Negroes would achieve their goals, that the rich dominated the poor in the United States, that the state of Israel had taken his home, and that "the Jewish people were on the top and directing the events in America." Appellant mentioned that he was angry with the United States because of "the support the Americans were giving to

Israel and the support of the Jewish people from this country." When appellant stated that there was more freedom in Russia and China than in America, Mr. Weidner inquired, "'Why don't you go there yourself.'" Appellant replied, "'Maybe one day I will go.'" (Rep. Tr. pp. 5431-33, 5443-44, 5446.)

When the Arabs lost the "Six-Day War" with Israel, appellant was excited and upset. He asked Mrs. Weidner, "'Don't you think the Jews can be cruel?'" He continued, "'I am going to tell you something that I have never told anyone else, not even my parents,'" and told Mrs. Weidner "about seeing an Israeli soldier cut off the breast of an Arab woman." (Rep. Tr. pp. 5449-50.)

Appellant quit work after several angry refusals to accept Mr. Weidner's suggestions concerning his work. Mr. Weidner had to summon the police when appellant refused to leave unless he were paid additional severance pay. Appellant unsuccessfully sued him for this pay. (Rep. Tr. pp. 5435-42.)

Grace Bryan, a member of the Ancient Mystical Order of Rosae Crucis, testified that appellant attended a meeting of the organization in Pasadena on May 28, 1968. He had not attended previously. Appellant

participated in an unspecified "experiment" and, when invited to partake in the refreshments, turned around and left. (Rep. Tr. pp. 5460-64.)

Enrique Rabago and Humphrey Cordero testified that they went to the Ambassador Hotel on primary election night, June 4, 1968, and observed appellant at approximately 9:30 or 9:45 p.m. at the election night headquarters for Max Rafferty, California Superintendent of Public Instruction. (Rep. Tr. pp. 5486-88, 5499-5500.) The two men spoke with appellant, who had a mixed drink in his hand and drank once from the glass. Appellant remarked, "'Don't worry if Senator Kennedy doesn't win. That son-of-a-bitch is a millionaire. Even if he wins he's not going to win it for you or for me or for the poor people.'" (Rep. Tr. pp. 5489-91, 5493, 5500-01.) Appellant also remarked that he had been looked down upon that evening because of his attire, and that therefore when he had paid the waitress he had given her $20 in payment for the drink and told her to keep the change in order to "show them." Appellant also stated, "'It's the money you've got that counts, not the way you look.'" (Rep. Tr. pp. 5494-95, 5502.) Appellant appeared "educated and arrogant" but not "drunk . . . or belligerent."

Had appellant not had a drink in his hand, the two men would have had no reason to believe that he was drinking. (Rep. Tr. pp. 5496-97, 5504, 5507.)

Hans Bidstrup, an electrician employed by the Ambassador Hotel, observed appellant at approximately 10:00 that night at the Venetian Room of the Ambassador, which was the Rafferty headquarters. (Rep. Tr. pp. 5465-68.) Appellant "had a glass in his hand so [Mr. Bidstrup] assumed he had been drinking." (Rep. Tr. p. 5469.) However, Mr. Bidstrup did not notice whether appellant was drinking from the glass. It appeared to Mr. Bidstrup, who does not drink intoxicating liquor, that appellant was intoxicated. Appellant conversed with Mr. Bidstrup for 10-15 minutes and was quite talkative. Appellant did not stagger; his speech was not slurred, and his eyes were not bloodshot. (Rep. Tr. pp. 5466-67, 5471-73.) Mr. Bidstrup based his opinion that appellant was intoxicated on the fact that his glass was half-empty, but Bidstrup "wouldn't know" whether "one-half a drink would make that man intoxicated or any man." (Rep. Tr. p. 5474.) Had appellant not had the glass in his hand, Bidstrup would "[n]ot necessarily" "have thought he was intoxicated." (Rep. Tr. p. 5475.)

Appellant asked Bidstrup whether he had seen Senator Kennedy and how long Senator Kennedy had stayed at the Ambassador, and appellant mentioned "the security of the hotel" and asked about the Senator's security. (Rep. Tr. pp. 5477-78.) It was stipulated between counsel at the trial that on June 12, 1968, Bidstrup had told an F.B.I. agent that appellant had inquired in what room or on what floor Senator Kennedy was staying, when Senator Kennedy was coming in or if Kennedy was in the hotel, and possibly whether the Senator had bodyguards. (Rep. Tr. p. 5484.) Bidstrup testified further that firemen were on duty because of the crowds, and when one entered in uniform appellant acted "startled." (Rep. Tr. p. 5479.)

Gonzales Cetina, a waiter at the Ambassador Hotel, observed appellant in the Venetian Room about 10:00 p.m. on election night, holding a drink and with a rolled newspaper under his arm. Appellant asked for Cetina's assistance in moving a chair. Later, at approximately 11:45, Cetina observed appellant in the pantry area next to the serving table where Senator Kennedy was thereafter shot. (Rep. Tr. pp. 5508-12.) Senator Kennedy was giving his speech inside the Embassy Ballroom at the time. (Rep. Tr. pp.

5513-14, 5516, 5518-19.)

Richard Lubic, apparently a member of the news media, was in the pantry when Senator Kennedy was shot. Immediately prior to the first shot, Mr. Lubic heard someone say, "'Kennedy, you son-of-a-bitch.'" (Rep. Tr. pp. 5523-25.)

Officer Robert Austin of the Los Angeles Police Department, another witness called by the defense, testified that shortly after appellant was brought to the Rampart station following his arrest, appellant asked an Officer Willoughby, who was drinking a cup of hot chocolate, whether he could have some too. When the officer refused, appellant inquired, "'Is it hot?'", and kicked the beverage out of the officer's hand, spilling it on the officer. Half an hour later appellant apologized. (Rep. Tr. pp. 5451-56.)

Appellant testified in his own behalf, describing his childhood years in Jerusalem and in particular the various incidents of bombing and shooting. He related his discovery of a human arm in the well, which incident had been described by preceding witnesses. (Rep. Tr. pp. 4509-10, 4815-18, 4834, 4837-38, 4842-43.) Appellant stated that he was a Christian Arab, had studied English since kindergarten, and could read

and write basic English by the time he emigrated to the United States. (Rep. Tr. pp. 4813-14.)

When he was a child, appellant was told that "[t]he Jews kicked us out of our home" and was told of the Deir Yassin massacre in which "two hundred and fifty some people, women and children . . . were slaughtered in cold blood by the Jews . . . and they were dumped into wells and some of the women . . . were taken on a truck and paraded through the city." (Rep. Tr. p. 4832.) Appellant described his awareness of the 1956 Suez Crisis in the Middle East, his family's emigration to the United States shortly thereafter, and his father's return to Jordan six or seven months later. (Rep. Tr. pp. 4852-53, 4859-66.)

Subsequently appellant's sister Ayda contracted leukemia, from which she ultimately died, and the time appellant took to care for her was responsible for some of his absence from classes at Pasadena City College; however, appellant also skipped classes to attend the horse races at Santa Anita and Hollywood Park. (Rep. Tr. pp. 4873-78.)

Appellant had wanted to become a United States diplomat and had therefore studied Russian and German. He had purchased an automobile with money he had earned

working at a gas station during the time he attended college. However, after his dismissal from college, he decided to become a jockey, working first as a stablehand at Santa Anita and subsequently as an exercise boy at the Altafillisch Ranch in Corona. (Rep. Tr. pp. 4879-85.) On September 24, 1966, appellant was injured in a fall from a horse at the ranch. He continued working for a while but quit in late November of that year. Appellant's eye bothered him for several months after the accident, and he received a $2000 award from Workmen's Compensation as the result of his injuries. (Rep. Tr. pp. 4886-93.)

During the following twelve months, appellant was unemployed and read a great deal at libraries and at home. (Rep. Tr. pp. 4894-96.) He "read everything about the Arab-Israeli situation that [he] could lay [his] hands on," including publications from the Arab Information Center in the United States and a book on Zionist influence on United States policy in the Middle East. (Rep. Tr. pp. 4924, 4928.) Appellant testified in great detail concerning the historical development of the world Zionist movement from its inception in 1897 to the outbreak of hostilities in Palestine after World War II. (Rep. Tr. pp. 4931-35.)

During this period of unemployment appellant also became increasingly interested in "the occult and metaphysical," although his interest antedated the fall from the horse. Because of his desire to learn more about himself, he joined the Rosicrucian Society, eventually attending the meeting previously described. (Rep. Tr. pp. 4898-4902, 5126-30.) One book read by appellant, entitled Cyclomancy, was described by him as follows: "the basis of what he says is you can do anything with your mind if you know how; . . . how you can install a thought in your mind and how you can have it work and become a reality if you want it to." (Rep. Tr. p. 4905.)

Appellant performed various exercises recommended in the book to make the reader "a better developed person." One of these exercises was putting his hand in a very hot pail of water and "thinking cool"--and vice versa. Part of his Rosicrucian teaching involved sitting at home with a mirror and candles and through concentration changing in his mind the color of the flame. These exercises "worked." (Rep. Tr. pp. 4906, 4911-13, 4916-18.) Appellant read a large number of other books in this area, some involving "thought transference." (Rep. Tr. pp.

4913-15, 4921-22, 4938-48.) One Rosicrucian article read by appellant taught him that if he wrote something down, he would accomplish his goal. (Rep. Tr. pp. 5103-07.)

During his direct examination appellant was examined page by page concerning the entire contents of the diaries found by the police on the corner of his dressing table and on the floor at the foot of his bed, five sheets of these diaries having been previously put in evidence by the prosecution. The defense then put in evidence all those portions of the two diaries not previously offered by the prosecution. (Rep. Tr. pp. 4955, 5095, 5191.)

Appellant testified that he had recorded various things in his notebooks "with the objective in mind of accomplishing [his] goal . . . [a]nd in reference to that, the assassination of Robert Kennedy." (Rep. Tr. p. 5108.) In contrast appellant had liked President John F. Kennedy because the latter had worked with Arab leaders for a solution to the Palestine refugee problem. (Rep. Tr. p. 4931.)

Appellant's notebooks included notes from his college classes, including biology and Russian, in addition to Arabic and Chinese script, the names

and addresses of various girls, notations on race horses, and general "doodling." (Rep. Tr. pp. 4950-52, 4956, 4958-61, 4964, 4979.)

Appellant admitted writing on May 18, 1968, that his "determination to eliminate R.F.K. is becoming more the more of an unshakable obsession . . . [and that he] must be assassinated before 5 June 68" (see Exh. 71-15 & 16) but did not remember doing so. However, appellant testified that he could have written this at the time Senator Kennedy "said he would send fifty planes to Israel." (Rep. Tr. pp. 4807, 4969.) Appellant had become very upset at the Arabs' loss in the 1967 war and at the aid which American Jews had given to Israel. (Rep. Tr. pp. 4929-30.) He had liked Senator Kennedy and until May 18, 1968, had hoped that he would win the Presidency. However, when appellant saw Senator Kennedy on television on or about that date, he realized that the Senator supported Israel. He became "burned up" about this. (Rep. Tr. pp. 4970-71.) Appellant would have killed Senator Kennedy at that moment had he then had the opportunity. He thought the Senator might have been in Oregon at the time. The June 5, 1968, deadline imposed by appellant for the death of Senator Kennedy was the one-year

anniversary of the six-day Arab-Israeli war of 1967. (Rep. Tr. pp. 4970, 4972-73.)

However, appellant termed "utterly false" the testimony of Alvin Clark to the effect that shortly after the assassination of Reverend King in April of 1968, appellant had stated his own intention to kill Senator Kennedy. (Rep. Tr. pp. 5195-97.)

When appellant heard the sound of the radio coming from his mother's room, announcing Senator Kennedy's commitment to support the delivery of fifty jet planes to Israel, appellant was looking into his mirror, engaged in his Rosicrucian studies. Concentrating, he observed the face of Senator Kennedy in the mirror. (Rep. Tr. pp. 4977-78.)

On June 2, 1967, appellant had recorded in his diary a "declaration of war against America" in which he noted that it had become necessary for him to "'equalize and seek revenge for all the inhuman treatments committed against me by the American people.'" The entry in appellant's diary went on to say that he would execute his plan

> "'. . . as soon as he is able to command a sum of money ($2,000) and to acquire some firearms -- the specifications of which

have not been established yet.

"'The victims of the party in favor of this declaration will be or are now -- the President, vice, etc -- down the ladder.

"'The time will be chosen by the author at the convenience of the accused.

". . . .

"'[T]he conflict and violence in the world subsequent to the enforcement of this decree, shall not be considered lightly by the author of this memoranda, rather he hopes that they be the initiatory military steps to WW III.

"'The author expresses his wishes very bluntly that he wants to be recorded by history as the man who triggered off the last war.'" (Rep. Tr. pp. 4987-4990.)

Appellant testified that when he wrote the foregoing, "I must have been a maniac at the time. I don't remember what was on my mind." (Rep. Tr. p. 4990.)

Other entries in the diary included "Long Live Nasser" and "Long Live Communism." (Rep. Tr. pp. 4994-95.) Appellant declared, "'I firmly support

the communists cause and its people, whether Russian, Chinese, Albanian, Hungarian or whoever. Workers of the world unite, you have nothing to loose [sic] but your chains, and a world to win.'" (Rep. Tr. p. 5096; see Exh. 72-123 & 124.) However, he denied ever having been a member of the Communist Party. (Rep. Tr. p. 5097.)

Appellant wrote that Ambassador Goldberg must die because "I didn't like what he said at the United Nations." (Rep. Tr. pp. 5018-20.) He wrote about assassinating the 36th President of the United States (President Johnson) because he "hated his guts" as a result of the President's Middle East policy. (Rep. Tr. pp. 5010-12.) He noted with respect to the last entry, "It looks like a crazy man's writing" but "I don't feel I am crazy." (Rep. Tr. p. 5013.) The notebooks continued, "'I advocate the overthrow of the current President of the fucken United States.'" (Rep. Tr. p. 5095; see Exh. 72-123.) On the witness stand appellant characterized the United States as "very good to me" but "n[o]t good to the rest of my people." (Rep. Tr. p. 5098.)

Appellant testified that he purchased the .22 caliber revolver in early 1968 with his own money

and for his own use, firing it at shooting ranges approximately six times between March and May of 1968. (Rep. Tr. pp. 5120-25.) Appellant then gave an account of his actions during the first five days of June, 1968.

On June 1, 1968, appellant bought some Mini-Mag ammunition at the Lock Stock & Barrel gun shop and engaged in target practice at the Corona Police Pistol Range. In purchasing the ammunition he had not requested this particular type; he had merely said, "Well, give me your best," and was then given the Mini-Mag. He had never before used Mini-Mag. Appellant attempted to use the range again on June 2d but was unable to do so because it was not open to pistol shooting on Sundays. (Rep. Tr. pp. 5126, 5131, 5153-54.)

After seeing an ad in the Los Angeles Times inviting attendance at a speech by Senator Kennedy at the Ambassador Hotel, appellant attended the June 2d speech. He did not bring a gun and did not contemplate assassination at that time. He had "completely forgotten" his diary entry of two weeks earlier in which he had recorded his mandate that Senator Kennedy die by June 5th. (Rep. Tr. pp. 5132-34, 5139.) When appellant

observed Senator Kennedy on June 2d, his "whole attitude towards him changed;" "that night, he looked like a saint" to him; appellant "liked him." (Rep. Tr. p. 5143.) The witness (Mrs. Miriam Davis) who testified to observing appellant in the kitchen area that night was a "complete liar." (Rep. Tr. p. 5144.)

During the preceding two weeks appellant had been going to the horse races and betting almost daily. Thus on June 3d appellant asked his mother for the remainder ($400) of his Workmen's Compensation award, which he had turned over to her, since he planned to attend the races on June 4th (election day) at Hollywood Park. (Rep. Tr. pp. 5147-48.) That evening he planned either to attend a Rosicrucian meeting or purchase new tires for his automobile. (Rep. Tr. pp. 5148-49.) However, when he saw the race entries in the newspaper he concluded that he did not like the horses that were running. He changed his mind and decided instead to go target shooting at the San Gabriel Valley Gun Club. (Rep. Tr. pp. 5148, 5150-51.) Although appellant already had three boxes of ammunition with him, on the way to the range he stopped to purchase five to seven additional boxes of ammunition at East Pasadena Firearms. (Rep. Tr. pp.

5152-55.)

Appellant remained at the range from about noon to 5:00 p.m., where he conversed with the rangemaster (Mr. Buckner) and purchased three or four additional boxes of ammunition from him. (Rep. Tr. pp. 5155-56, 5159.) Appellant considered himself "a pretty good shot" with a "good gun" and considered his revolver a good gun. He denied engaging in rapid fire at the range; he fired in a normal manner, and it was an elderly man who did rapid firing with a .38 caliber weapon. (Rep. Tr. pp. 5156-58.) He did not remember saying anything about killing a dog, although he "could have talked about it." At the time he did not have in mind shooting Senator Kennedy. (Rep. Tr. p. 5161.) He had just reloaded his weapon when the range closed and therefore left the range with his weapon loaded, placing it on the rear seat of his automobile. He did not remove the live bullets from the revolver even though he had brought along a screwdriver to facilitate ejection of the cartridges. (Rep. Tr. pp. 5165-68.)

After having dinner at a restaurant appellant observed a newspaper ad which read, "'Join in the

Miracle March, for Israel.'" (Rep. Tr. pp. 5172, 5174.) "That brought [him] back to the six days in June of the previous year . . . [T]he fire started burning inside of [him]" as the result of this ad. (Rep. Tr. p. 5175.)

Appellant mistakenly thought the parade was scheduled for that evening and set out to observe it. He "was driving like a maniac," got lost, but eventually arrived at Wilshire Boulevard where he looked for the parade. The gun was still on the back seat. (Rep. Tr. pp. 5177-80.) His wallet was in the glove compartment; appellant always carried his money loose in his pocket and never kept a wallet on his person. (Rep. Tr. pp. 5182-83.)

When appellant saw a sign for United States Senator Kuchel's headquarters, he dropped by and was told that a large party for Senator Kuchel was going on at the Ambassador Hotel. As appellant walked toward the hotel (his gun still in the automobile), he observed a large sign concerning some Jewish organization. This "boiled [him] up again." (Rep. Tr. pp. 5181, 5185-88, 5209.)

Upon entering the lobby of the hotel appellant observed a sign at the entrance to the Rafferty

headquarters, which were located in the Venetian Room. Appellant joined the Rafferty celebration, where he stayed an hour. Appellant's main purpose was to see Rafferty's daughter, whom he knew from school, but he never saw her that evening. While at the celebration he ordered two Tom Collins drinks. (Rep. Tr. pp. 5198-5202.)

From there appellant went on to the headquarters of Alan Cranston, candidate for United States Senator, which were located in another area of the hotel. (Rep. Tr. p. 5203.) Appellant did not remember asking anyone that evening where Senator Kennedy was "going to come through." Appellant had no specific recollection how many drinks he had that evening and did not know whether he had more than two. He did feel "quite high" and therefore decided to go home. (Rep. Tr. pp. 5207-09.)

Appellant testified that he returned to his automobile and "couldn't picture myself driving my car at the time in the condition that I was in." He feared receiving a traffic citation or having an accident without being covered by insurance, and decided to return to the party so as to sober up with some coffee. It had never "dawned" on him to drink some coffee when

he first left the party. He did not remember picking up the gun from the car seat before returning to the hotel for coffee, but he "must have." (Rep. Tr. pp. 5210-12.)

While drinking his coffee, he engaged a beautiful young girl in conversation. He did not remember "[w]hat happened next" until he "was being choked"; he recalled nothing in between. (Rep. Tr. pp. 5214-15.) His next recollection was his being brought to a police car and one of the officers pulling his hair, jerking appellant's head back, and shining a light in his eyes. Other than this alleged incident he suffered no mistreatment; everyone was "so friendly" and treated him "very nicely." He was soon advised of his constitutional rights. (Rep. Tr. pp. 5216-19.) But when an officer refused appellant a sip of hot chocolate at the Rampart station, appellant kicked the cup out of the officer's hands. (Rep. Tr. pp. 5219-20.) Appellant refused to give the officers his name that night and did not discuss anything about the case because "[t]hey never brought it up." (Rep. Tr. pp. 5221-22.)

Appellant testified that he shot Senator Kennedy but was unaware of shooting the other victims named in the indictment, although he "must have" and

finding the gun on the back seat of the automobile "might have been the stress." (Rep. Tr. pp. 5815, 5817.) The "gun symbolized . . . giving to himself an aggressive personality that he basically did not possess. . . . and further symbolized, well, his need to be in charge of his own destiny, not to be castrated as he allegedly was by his father." (Rep. Tr. p. 5819.) The dissociate state is normally characterized by amnesia as to events, and appellant's amnesia began with the picking up of the gun. (Rep. Tr. pp. 5827-29.) However, Mr. Schorr did not know when the dissociate state began, only that it began sometime prior to the shooting. Nor did he know when the dissociate state ended, or even whether it had come to an end by the date of the trial. (Rep. Tr. p. 5847.)

During the course of his cross-examination, Mr. Schorr listened to tape recordings of lengthy conversations which took place between appellant and members of the district attorney's office and Los Angeles Police Department during the hours following appellant's arrest. (Rep. Tr. pp. 5947-57, 5970-6170.) As reflected by some of the above-summarized testimony (see Respondent's Brief, pp. 15-18), during these conversations appellant refused to give his

name, made no statements (incriminatory or exculpatory) relating to the shooting, and engaged in banter unrelated to the case. Mr. Schorr testified that during these conversations appellant was not under any delusion that he was being pursued by real or imaginary persons and was not responding to "voices or other influencing entities." However, Schorr did not know whether appellant was under a "delusional or false belief" at the time. (Rep. Tr. pp. 6171-72.)

Mr. Schorr admitted that on July 10, 1968, prior to examining appellant, he had written a letter to defense counsel Russell Parsons in which Schorr related, "'I would like to help you very much in the matter of preplanning jury selection on the basis of the personality dynamics of the client, since so many headaches can be avoided if proper jury selection tuned to the emotional needs of Sirhan can be met, prior to the trial.'" (Rep. Tr. pp. 5928, 6175-76.) However, Schorr denied having made up his mind to be a defense witness at the time he wrote this letter, nor at that time had Schorr formed an opinion as to appellant's mental condition although Schorr "had all kinds of vague ideas," "undifferentiated ideas based upon the reports from the Life Magazine article

and the Press and the TV." (Rep. Tr. pp. 6176, 6180.) Among these "ideas" was Schorr's statement in his letter, "'There can be no real [basis] for premeditation where all facts are known.'" (Rep. Tr. p. 6185.) Schorr closed his letter with the words, "With kindest wishes toward a hopeful outcome,'" but the hopeful outcome was only "that justice would be served" and that Schorr would "be asked to be a part of the defense team." (Rep. Tr. p. 6176.)

In a December 10, 1968, letter to Mr. Parsons, Mr. Schorr wrote that the "'conclusions of this study by the undersigned . . . are based completely on materials reported upon in this paper, independent of any other studies that have been made prior to this date, or which may be made at a later date, by persons other than the undersigned.'" (Rep. Tr. pp. 5874-75.) Yet substantial portions of Schorr's final report were taken verbatim or almost verbatim from a book entitled Casebook of a Crime Psychiatrist, by James A. Brussel, M.D. (Rep. Tr. pp. 6188, 6255-56, 6259-62, 6268, 6271-74, 6292-95.) Schorr testified that he had read the book, having purchased it shortly after it came out in November or December of 1968. He had it before

him as he prepared substantial portions of his final report dated December 18, 1968. Although he "used considerable material from this book," he did not employ quotation marks or footnotes to indicate that the material had been taken from another source. (Rep. Tr. pp. 6196, 6254-55, 6265-66, 6282-83.) Although the book had no raw data and was based on what defense counsel characterized as "imaginary cases," Schorr considered the book "an authority in the field of psychiatry." (Rep. Tr. pp. 6246, 6256-57, 6260-61.) He "went through this entire book . . . looking for exciting language." (Rep. Tr. p. 6305.) Six passages from a chapter entitled "The Mad Bomber" appeared in Mr. Schorr's report. (Rep. Tr. pp. 6189, 6281.) Schorr had never made tests on that "Mad Bomber." (Rep. Tr. p. 6260.)

A lengthy portion of his final report was copied by him from the chapter entitled "The Christmas Eve Killer," a description of a boy who desired to kill his mother. (Rep. Tr. pp. 6193, 6295, 6297-98.) Schorr was not "interested in the factual similarity or dissimilarity"; he just wanted to use the "languag that applies to the paranoid mechanism." (Rep. Tr. p. 6278.) This passage from Schorr's report reads as

follows, with only minor discrepancies between Schorr's report and the book:

> "'By killing Kennedy, Sirhan kills his father, takes his father's place as the heir to his mother. The process of acting out this problem can only be achieved in a psychotic, insane state of mind. Essentially the more he railed and stormed, the more the mother protected Sirhan from his father and the more he withdrew into her protection. He hated his father and feared him. He would never consciously entertain the idea of doing away with him, but somewhere along the line the protecting mother fails her son. The mother finally lets down the son. She whom he loved never kept her pledge, and now his pain has to be repaid with pain. Since the unconscious always demands maximum penalties, the pain has to be death. Sirhan's prime problem becomes a conflict between instinctual demand for his father's death and the realization through his conscience that killing his father is not socially acceptable.

The only real solution is to look for a compromise. He does. He finds the symbolic replica of his father in the form of Kennedy, kills him and also removes the relationship that stands between him and his most precious possession, his mother's love.'" (Rep. Tr. pp. 5850-51, 6292-94.)

On redirect examination Mr. Schorr testified that at the time of the conversations between appellant and police officers following the arrest, appellant was in a "dissociate state." Schorr perceived "a striking lack of consciousness, awareness of why he was being detained and the second most striking thing . . . was the lack of the usual kind of hostilities that he reserved in responding to questions relating to his monomania." (Rep. Tr. pp. 6323-24.) "Another point is he almost immediately reverses the role consistent with a paranoid mechanism where he puts himself above and beyond and, instead of being interrogated, he becomes the interrogator." (Rep. Tr. p. 6325.)

On recross-examination Mr. Schorr testified that appellant "can premeditate," "has that ability," "[a]nd he also has the ability to harbor or have malice" but not "the ability to have a mature reflection

upon conduct." (Rep. Tr. p. 6331.)

Orville Richardson, a clinical psychologist, was asked by Dr. Eric Marcus, a court-appointed psychiatrist who testified as a defense witness, to conduct a psychological examination of appellant. (Rep. Tr. pp. 6334-36.) Mr. Richardson tested appellant in his cell between 11:00 a.m. and 2:00 p.m. one day in July of 1968, administering the previously described Wechsler, Rorscharch, TAT, and Bender tests. He did not administer a MMPI test because Dr. Marcus had already done so. (Rep. Tr. pp. 6337, 6477.) In order "to test the possibility of organic brain disease," Mr. Richardson also administered the Hooper Visual Organization Test. This test, as well as other tests including an electroencephalographic examination administered "under alcohol" by Dr. Edward Davis, a neurologist, led Mr. Richardson to conclude that appellant had no brain damage. (Rep. Tr. pp. 6337, 6378, 6437, 6439.)

Mr. Richardson testified that his "approach to the Rorschach was somewhat different than Dr. Schorr's." (Rep. Tr. p. 6354; see also Rep. Tr. pp. 6415, 6423.) Richardson also explained,

"[W]hen you give a long Rorschach -- and

this is a very long Rorschach -- there is always a tendency to lose data. There are some responses which I took down but which I didn't inquire for, and -- either because I was excited and jumpy and wasn't functioning properly at the time or what-have-you, there were some responses I missed. . . ." (Rep. Tr. p. 6422.)

Likewise Mr. Richardson obtained results from appellant's Bender test different from those obtained by Mr. Schorr, although Mr. Richardson concluded that appellant "appeared to be in somewhat worse shape" when Schorr tested him three months after Richardson. (Rep. Tr. pp. 6379, 6383.)

Mr. Richardson read into the record his August 13, 1968, report of appellant's "Psychological Evaluation." (Rep. Tr. pp. 6339-51.) Richardson's conclusion was that of "'a very severe emotional and mental disturbance in a man of bright-normal to superior intellectual potential. . . . capable under conditions of minimal stress of presenting himself in a logical, plausible fashion.'" He noted that at certain times appellant's "'behavior and thinking become psychotic

and are characterized by paranoid, projective distortion of the characteristics and motives of others, loss of judgment, loss of discrimination, loss of control over impulses, particularly hostile, aggressive impulses.'" (Rep. Tr. p. 6349.) Richardson's report also concludes that "'in this psychotic ego state, he could not "know" the difference between right and wrong, as non-disturbed individuals in our culture would judge this difference.'" (Rep. Tr. p. 6350.) The "'over-all diagnostic impression is of a schizophrenic process, paranoid type, acute and chronic.'" (Rep. Tr. p. 6351.)

In his testimony Mr. Richardson further characterized appellant as a "very ill person who was descending further into mental illness," who was "severely depressed," and who had a "definite suicide potential" and a "definite homicidal potential." (Rep. Tr. pp. 6432-33.) Richardson found appellant "not able to maturely and meaningfully premeditate" to kill a human being, and unable for at least the past year or two to maturely premeditate or comprehend his duty to govern his actions in accordance with the duty imposed by law. (Rep. Tr. pp. 6437-38.) Richardson concluded that appellant's "comprehension

of his duty has been that of a kind of a soldier and a representative of his nation. He goes beyond what we would consider our duty. His duty is defined on a highly personal essentially psychotic basis. . . . [H]e is not capable of malice as defined." (Rep. Tr. p. 6439.)

On cross-examination Mr. Richardson admitted that he began with an "assumption" that appellant was paranoid because of what he had heard even before becoming associated with the case. (Rep. Tr. p. 6444.)

He noted that particular responses would be characterized by different psychological labels on the part of various authorities in the field of psychology. (Rep. Tr. p. 6462.) The Rorschach scoring sheets compiled by Richardson and Schorr have "certain major differences that are of interest," and "those differences may be clinically significant." (Rep. Tr. pp. 6474-76.) Of one of Schorr's scorings, Richardson could not "say it is a mistake because I don't know what Dr. Schorr's reasoning processes were as a clinician. As a clinician he is entitled to claim in this column anything he wishes, after he has made an analysis of the data." Richardson did not know what Schorr's "reasoning" was when Schorr placed appellant's designation

of an inkblot as a flying dove into a column labeled "Violence." Richardson had never seen Rorschach scoring columns designated as a paranoid column and a violence column, as Schorr had done. (Rep. Tr. pp. 6453-56.) Nor could Richardson understand Schorr's designation of a scoring column as "Fragmentation"; Richardson would instead label such a column "Pure Psychosis." (Rep. Tr. p. 6460.) Asked whether Schorr had properly labeled one column "neurotic anxiety," Richardson responded, "I can't see how he arrived at that. No, I cannot see how he would label it 'Neurotic.'" (Rep. Tr. 6466.)

Mr. Richardson also noted that clinical psychologists have the view that "mistakes" in test responses are not "happenstance," that for example "if you forget your keys in the morning, sometimes that might even have a lot of meaning." (Rep. Tr. pp. 6529-30.)

One of appellant's "critical item" responses was an affirmative mark next to the statement, "'I have strange and peculiar thoughts.'" Yet Mr. Richardson testified, "I have had thoughts that I regard as somewhat strange or peculiar." (Rep. Tr. pp. 6558-59.) Richardson testified that Deputy District Attorney Howard's

cross-examination of Schorr "worried" him and, thinking that "there might be some scoring errors" in his own work, he rechecked it and found "a couple" of errors. (Rep. Tr. pp. 6447-48.) Richardson related, "[I]n fact we make almost a fetish in psychiatry and psychology of seeing the psychologist as a fallible tool. We are always running off to Beverly Hills to have our blind spots probed and analyzed so that we can have our eyes opened a little bit to some of the areas where we might miss the boat." (Rep. Tr. p. 6446.)

With reference to the psychological testing of appellant, Richardson admitted that "the mere fact of an incarceration situation is very heavy in special stress," that appellant's condition was to some degree a "response to jail environment," that "the longer he was isolated and the more his isolation, it would deepen his psychosis," and that "only a person of a relatively normal personality structure can handle this well, this major kind of stress." (Rep. Tr. pp. 6478, 6487-88.)

Mr. Richardson admitted that his diagnosis of appellant as "suspicious, distrustful, [feeling] hostile forces in the world working against him," must be viewed in light of the fact that appellant

was isolated in custody, not permitted to mingle with other prisoners, and aware that he had killed a major political figure in American public life and that a great many people harbored malice against him for that reason. (Rep. Tr. pp. 6478-82.)

In January of 1969 at a "meeting of the defense team in Grant Cooper's office," it was decided to submit the "raw data" from Mr. Richardson's and Mr. Schorr's testing to two other psychologists, Georgene Seward and George De Vos, for further review. (Rep. Tr. p. 6337.) On his own Mr. Richardson also submitted his data to two additional psychologists, Steven Howard and William Crain. (Rep. Tr. pp. 6338, 6426-27.)

Mrs. Seward, a psychologist invited by Dr. Seymour Pollack, a psychiatrist who testified for the prosecution, to prepare a report, "examined each of the tests by each of the examiners . . . compared them. . . . [and] noted the differences and the similarities that were shown." (Rep. Tr. pp. 7213, 7226, 7296.) She knew the identity of the subject who had been tested. (Rep. Tr. pp. 7270-71.)

Her conclusions agreed with those of Messrs. Schorr and Richardson. (Rep. Tr. pp. 7234-35.) Her "over-all impression was that [appellant] was in a

paranoid schizophrenic reaction." (Rep. Tr. pp. 7229-30.) She concluded that the "indications suggest emotional lack of control, not any gross organic impairment." (Rep. Tr. p. 7228.) Appellant's "loss of control and the tendency to act out impulsiveness was clearly evidenced." (Rep. Tr. p. 7230.) On cross-examination she agreed that "the Rorschach has received a substantial amount of criticism by clinical psychologists and psychologists generally." (Rep. Tr. pp. 7287-88.) She said of Mr. Richardson's Bender test, "It shows very little and this is very superficial." (Rep. Tr. p. 7290.)

Mr. De Vos, as part of his training as a psychologist, had studied the influence of cross culture on psychological testing. (Rep. Tr. pp. 7297, 7306, 7501.) He was requested by Dr. Pollack to evaluate the raw data of Messrs. Schorr and Richardson. In particular, since he had studied Algerian Arabs, he was asked to consider the significance of appellant's Palestinian background in the test results. From his experience, "the psychodiagnostic tests work quite effectively in spite of cultural differences." (Rep. Tr. pp. 7306-07.) He found that "there were some responses in [appellant's] Rorschach which would be

more frequently found in an Arab subject, but that had nothing to do with the diagnosis," which in De Vos' opinion was that appellant "was a paranoid schizophrenic." (Rep. Tr. pp. 7308, 7311.) Mr. De Vos did recognize, however, that in his profession there are "behaviorist psychologists, who don't give any credence at all to the use of tests." (Rep. Tr. p. 7314.)

Steven Howard also received Richardson's raw data, and spent four hours interpreting it. (Rep. Tr. p. 6584, 6591-93.) Howard did not score the raw material since he was only consulted and was not asked for a formal report; as he explained, he "score[d] in my mind the different responses" and analyzed their content. (Rep. Tr. p. 6593.)

Mr. Howard scored appellant as "paranoid" but not as "schizoid" or having a "psychosis." (Rep. Tr. pp. 6596, 6600.) Appellant appeared to have a definite possibility of suicide and "some possibility of homicidal acting out." (Rep. Tr. pp. 6601-02.) Appellant's record was characterized by paranoia and depression, a state that he had probably been in for most of his life. (Rep. Tr. p. 6595.) Howard's conclusion was that appellant "is a very sick man who I

diagnosed as a borderline psychotic person but this I meant as an individual who can go in and out of psychosis, depending on the rather relative minor stresses which occur in daily life." (Rep. Tr. p. 6595.)

On cross-examination Mr. Howard defined "borderline" as meaning that "he is not classified as openly psychotic." (Rep. Tr. p. 6607.) Appellant was under a stress situation at the time the test was administered, being in custody and awaiting a murder trial. Mr. Howard recognized that a non-psychotic person with appellant's background in the Middle East could become very angry, show stress, and "demonstrate certain breakdowns" regarding his political feelings. It is psychologically normal to resent the acts of a political leader, and under the conditions of the Arab-Israeli war, a non-psychotic person could feel strongly enough to conclude that "taking a life is right." A normal person could "weigh the pros and cons," decide to take a life for a political purpose, and carry out the logical steps to effect this goal. (Rep. Tr. pp. 6603-04, 6609-12, 6614-16.) Appellant's actions in engaging in rapid fire at the range, in inquiring as to Senator Kennedy's intended route, and

in carrying out the assassination were consistent with a logical approach. (Rep. Tr. pp. 6616-18.)

Mr. Crain received the raw data from Richardson in March of 1969 and was asked by him to evaluate it. (Rep. Tr. pp. 6623, 6629-30.) From the test data Crain formed the opinion that appellant posed a definite possibility of suicide and some possibility of homicide. (Rep. Tr. pp. 6633-35.) He found that appellant was psychotic and "was suffering from schizophrenia of the paranoid type." (Rep. Tr. pp. 6635, 6638-39.)

Dr. Eric Marcus, a psychiatrist, was appointed by the superior court in June of 1968 to examine appellant at county expense. Dr. Marcus selected Mr. Richardson to aid him in making a diagnosis, and Richardson reported his psychological findings to Dr. Marcus. (Rep. Tr. pp. 6641, 6647-48.) Dr. Marcus also took into consideration the reports of the other psychologists, the written report of Dr. Pollack, and the books belonging to appellant, and he researched the subject of political assassinations. (Rep. Tr. pp. 6651-61.) Dr. Marcus interviewed Adel Sirhan and Mrs. Sirhan and examined appellant on June 15, July 3, October 12, and October 30, 1968. Each examination lasted between 20 minutes

and 2 hours. On one such occasion appellant was given six ounces of alcohol to consume. (Rep. Tr. pp. 6651-52, 6659.) However, Dr. Marcus testified, "the main things that I considered were his notebooks and the results of the psychological tests." (Rep. Tr. p. 6663.)

Dr. Marcus classified himself as "one of those psychiatrists who do not like to place labels upon a mental illness." He defined mental illness as "some aberration of a person's mind, whether it be in the way he uses logic or his ability to think logically, or in his emotions." (Rep. Tr. pp. 6661-62.) He believed in the efficacy of psychological test data but did not think that the interpretation of the test data "would be any better than the psychologist doing the interpretation." (Rep. Tr. pp. 6671-72.)

Dr. Marcus arrived at the following conclusion regarding appellant's mental state. Appellant had a mental illness on June 5, 1968. (Rep. Tr. p. 6662.) "In my opinion he started to show signs of mental illness at the very latest at the time following his horse accident, and that his adjustment in mental state had deteriorated since then. In not a particularly dramatic, fluctuating manner; in a rather slow, insidious

way." (Rep. Tr. p. 6661.) In Dr. Marcus' opinion appellant lacked "the mental capacity to maturely and meaningfully reflect upon the gravity of this contemplated act of murder . . . with malice aforethought"; appellant lacked "mental capacity and ability to comprehend his duty to govern his actions in accord with the duties imposed by law." Appellant's "mental disturbance was relevant and directly related to his political views and his feelings about Robert Kennedy." (Rep. Tr. pp. 6666-67.)

Dr. Marcus recognized that a person who is "mentally ill" can "plan," "form an intent to kill," and "entertain malice aforethought." However, he felt that appellant was incapable of "having malice within that technical sense" because appellant could not conform his "conduct, not to do anything wrong, and in [Dr. Marcus'] opinion Sirhan thought that he was really more or less the saviour of society." (Rep. Tr. p. 6668.) The fact that appellant's diary also declared his desire to kill Burt Altfillisch, a former employer, was "somewhat out of context" but did not change Dr. Marcus' opinion. (Rep. Tr. pp. 6669-70.) He found that appellant "in terms of psychology and personality . . . is an American . . . and that [his]

responses are Western-American and not the Middle-Eastern type of responses." (Rep. Tr. p. 6674.) Appellant's notebooks appeared to Dr. Marcus to be "very, very typical and very similar to the notebooks and the diaries and the letters that insane people have written who have threatened the President or who are now . . . hospitalized at Atascadero State Hospital." (Rep. Tr. p. 6663.)

On cross-examination Dr. Marcus testified, "Yes, in my opinion the defendant had the capacity to form the specific intent to kill, and specifically to kill Senator Kennedy." (Rep. Tr. p. 6763.) Dr. Marcus never found, and appellant never claimed, that appellant had amnesia at any time between his fall from the horse and his visit to the Ambassador Hotel. (Rep. Tr. p. 6735.) However, Dr. Marcus believed appellant's claim that he did not remember the events which preceded his being pinned to the serving table in the Ambassador Hotel kitchen. (Rep. Tr. p. 6784.) Nevertheless, Dr. Marcus testified, "I don't know whether he has real amnesia, retrograde amnesia, or whether he is malingering altogether. It could be any of those." (Rep. Tr. p. 6788.) Dr. Marcus "would say it would be a toss-up between malingering and

retrograde amnesia"; "more likely than not he did not have a bona fide amnesia," particularly since at the police station appellant appeared unconcerned and did not inquire why he was being held. (Rep. Tr. p. 6789.) When asked, "Then . . . when Mr. Sirhan claimed this amnesia in his interview with you, he was lying to you?", Dr. Marcus replied, "That's quite possible." (Rep. Tr. p. 6790.)

Dr. Marcus recognized that appellant's notebooks evidently were purchased by appellant while he was attending Pasadena City College. The various writings were placed there "at different times" and "out of chronological order sometimes";

> "[T]hat accounts for what appears to be a lot of confusion in these note books, when you look at it and see that part of it is in pencil and in different kinds of ink, you are forced to the conclusion that he wrote something at one time and at another time he went back and just in the interest of conserving paper he made a few more notations wherever there was room to write." (Rep. Tr. pp. 6769-70.)

Dr. Marcus agreed that normal persons might "doodle and

write down their thoughts" and that such doodling "might look pretty bad . . . from the standpoint of analysis." (Rep. Tr. pp. 6772-73.)

Dr. Marcus felt that "the business of not looking for a job for a substantial period of time and reading in libraries subjects that interested him is evidence of deterioration." Appellant's subsequently going to work at the Pasadena health food store "may or may not have anything to do with any sort of mental deterioration." (Rep. Tr. pp. 6693-94.)

Of appellant's visit to the Ambassador Hotel two days prior to the assassination, Dr. Marcus said, "He didn't go to get involved and enjoy himself; he went there more as an enemy . . . trying to gather all of the information and sort of size things up . . . well, a sort of a spy operation." It is possible that appellant's purpose was to familiarize himself with the premises in preparation for returning on a later occasion to kill Senator Kennedy, or appellant "might have been out there with a gun on that day, to kill the Senator, but just did not have the opportunity." (Rep. Tr. p. 6779.) "[F]or someone who was planning an assassination, he asked some

reasonable questions." (Rep. Tr. p. 6782.)

On redirect examination Dr. Marcus testified that he had examined two history books which appellant purportedly had owned and annotated in his high school years. Following a sentence in one text reading, "'After a week of patient suffering the President [McKinley] died[, t]he third victim of an assassin's bullet since the Civil War,'" appellant had inscribed the words, "'Many more will come.'" (Rep. Tr. pp. 6790-91.) In the other text appellant had underlined a passage describing the assassination of Archduke Francis Ferdinand. (Rep. Tr. pp. 6793-94.) Dr. Marcus concluded, "So he is already thinking about assassination *in high school*," "*for* an awfully long period of time." (Rep. Tr. pp. 6791-92, 6794.) Appellant's early interest in assassination was significant because some of the recent studies on paranoid schizophrenics indicate that such a condition "takes about ten years to develop." (Rep. Tr. pp. 6796-97.)

When appellant was given six ounces of alcohol in the form of Tom Collinses, in order to duplicate the conditions "presumably" affecting appellant on the night of June 4th, his brain waves showed no abnormality. However, appellant had psychological

reactions to the alcohol, becoming extremely irritated and restless, and had to be physically restrained. Appellant was "very hostile" to Dr. Marcus, thought that Marcus was his brother, and took the deputy sheriffs to be Israeli soldiers. Appellant spoke of Senator Kennedy as if he were alive. Although he never related the actual shooting, appellant did say, "'That bastard isn't worth the bullets.'" (Rep. Tr. pp. 6811-13.)

Dr. Bernard Diamond, a psychiatrist, examined appellant at the request of defense counsel on eight occasions, for a total of 20 to 25 hours, between December of 1968 and March of 1969. (Rep. Tr. pp. 6845-46, 6861-62, 6876.) Dr. Diamond also studied appellant's notebooks and books, the testimony of appellant and some other witnesses, interviews with Mrs. Sirhan and Munir Sirhan, psychological test material, and reports of chromosome and electroencephalogram examinations (both examinations showing appellant to be normal). (Rep. Tr. pp. 6881-83.)

Dr. Diamond characterized portions of the notebooks as "in the nature of a political manifesto and . . . a product of his paranoid schizophrenic psychosis," and other portions as "written in a self-induced hypnotic trance, a dissociate state similar

to that in which I believe he committed this killing itself." (Rep. Tr. pp. 6879-80.)

Appellant claimed he had "no memory of the actual shooting and . . . of the notebook itself," but under hypnosis he was able to "recall the circumstances of writing the notebooks and . . . . produce very strikingly similar notebooks." (Rep. Tr. pp. 6849, 6880-81.) Under hypnosis appellant wrote his name over and over again "like a robot," repeatedly wrote "RFK must die," and responded affirmatively when asked whether Senator Kennedy was alive. (Rep. Tr. pp. 6949, 6956, 6959, 6960.) Appellant stated that this was "the way" he had written his notebooks at home. (Rep. Tr. p. 6962.) In response to questions appellant stated that he was not "crazy," that he was "writing crazy" as "practice" for "mind control," for the purpose of "self-improvement." Appellant said he had taught himself to write in this automatic fashion from Rosicrucian materials and that he had hypnotized himself with a mirror when he wrote the notebooks. (Rep. Tr. pp. 6962-66.) It was Dr. Diamond's opinion that an article which appellant had read, entitled "Put it in Writing" in the Rosicrucian Digest, had "started him out on this self-induced automatic

writing thing." The article counseled that one should write down repeatedly what one wanted to achieve as a goal. (Rep. Tr. pp. 6987-88.) Appellant stated that he had "willed" Senator Kennedy to die in order to prevent the delivery of airplanes to Israel. (Rep. Tr. p. 6990.)

Although Dr. Diamond was "impressed by . . . the extreme similarity of the writing here with the writing in the original notebook," he testified that with respect to appellant's discussion of the notebooks he "had the feeling more than at any other time in my examinations of Sirhan in the conscious state that he was being considerably less than truthful with me." (Rep. Tr. pp. 6948, 6959.)

Generally, appellant was "telling the truth" about some things, being "very evasive" about other matters, and "lying" as to others. It was "very difficult to determine what was the truth." (Rep. Tr. p. 6884.) The initial story which appellant told Dr. Diamond was essentially the same as that related in appellant's testimony, "in which it was very apparent that there were certain conspicuous omissions from the material which he was able or willing to talk about." (Rep. Tr. p. 6848.) Appellant told Dr. Diamond on several

occasions that he "doesn't want to be considered as mentally ill." (Rep. Tr. p. 6991.)

It was Dr. Diamond's opinion that "The combination of events which led to the assassination of Robert F. Kennedy by Sirhan . . . started with Sirnan Sirhan's exposure to violence and death in Jerusalem in 1948, and it continues with his immigration to the United States." (Rep. Tr. p. 6994.) These early childhood wartime experiences were significant in forming appellant's "pathologically sick mental and emotional condition." (Rep. Tr. p. 6887.)

Under hypnosis appellant denied that anyone had paid him to shoot Senator Kennedy or had known in advance that he would shoot him, and denied that any other Arab had had anything to do with the assassination. Appellant stated that he had thought "this all up" by himself, had consulted with no one, and was the only person involved in the shooting. He denied receiving help from any member of his family and denied the existence of any conspiracy. Asked why he shot the Senator, appellant at first mentioned "'the bombers to Israel'" and then replied, "'I don't know.'" He also stated that he was telling the truth. (Rep. Tr. pp. 6932-34.) Appellant maintained that he did

not enter the Ambassador Hotel on the night of June 4th with the intention of killing Senator Kennedy but that he wandered into the pantry after having four Tom Collinses and returning briefly to his car, thereafter drinking coffee in the lobby, where he became confused by the mirrors and bright lights. (Rep. Tr. pp. 6937-41.) Senator Kennedy and his party entered the pantry and "rushed at" appellant. Appellant's first thought was to shake hands with the Senator, but when the two of them came in almost direct contact, appellant pulled the gun out of his belt and fired at him repeatedly, shouting, "'You son-of-a-bitch.'" (Rep. Tr. pp. 6941-42.) Appellant then began to choke in the presence of Dr. Diamond, thereafter falling into a deep sleep. When wakened by Dr. Diamond, appellant claimed no recollection of what had happened under hypnosis. (Rep. Tr. pp. 6943-44.) Dr. Pollock was also present on this occasion at the invitation of Dr. Diamond. (Rep. Tr. p. 6941.)

Dr. Diamond gave the following interpretation of the events leading up to the assassination:

> "With absolutely no knowledge or awareness of what was actually happening in his Rosicrucian and occult experiments, he was

gradually programing [sic] himself, exactly like a computor [sic] is programmed by its magnetic tape, programming himself for the coming assassination. In his unconscious mind there existed a plan for the total fulfillment of his sick, paranoid hatred of Kennedy and all who might want to help the Jews. In his conscious mind there was no awareness of such a plan or that he, Sirhan, was to be the instrument of assassination.

"It is my opinion that through chance, circumstances, and a succession of unrelated events, Sirhan found himself in the physical situation in which the assassination occurred. I am satisfied that he had not consciously planned to be in that situation. I am satisfied that if he had been fully conscious and in his usual mental state he would have been quite harmless, despite his paranoid hatreds and despite his loaded gun.

"But he was confused, bewildered and partially intoxicated. The mirrors in the hotel

lobby, the flashing lights, the general confusion -- this was like pressing the button which starts the computor [sic]. He was back in his trances, his violent convulsive rages, the automatic writing, the pouring out of incoherent hatred, violence and assassination. Only this time it was for real and this time there was no pencil in his hand, this time there was only the loaded gun.

". . . .

"These are the psychiatric findings in this case. They are absurd, preposterous, unlikely and incredible because the crime itself was a tragically absurd and preposterous event, unlikely and incredible. But I am satisfied that this is how Sirhan Bishara Sirhan came to kill Senator Robert F. Kennedy on June 5, 1968." (Rep. Tr. pp. 6996-99.)

The ultimate diagnosis reached by Dr. Diamond was that appellant was suffering from a "chronic paranoid schizophrenia, a major psychosis, at the time of the shooting. He was in a highly abnormal dissociated

state of restrictive consciousness as a direct consequence of this psychotic condition." (Rep. Tr. p. 6877.) He also was "unable because of mental disease to maturely and meaningfully reflect upon the gravity of his contemplated act and . . . unable, because of mental disease, to comprehend his duties to govern his actions in accordance with the duties imposed by law." (Rep. Tr. p. 6881.) Dr. Diamond viewed appellant as "small and helpless, pitifully ill." (Rep. Tr. p. 6998.)

On cross-examination Dr. Diamond testified that until he first observed appellant, which was six months after the assassination, none of the "people who had seen him, including psychologists and psychiatrists and his lawyers, nobody else really had the proper whole story of Sirhan." (Rep. Tr. p. 7094.) However, until the trial Dr. Diamond never knew that in April of 1968 appellant had told the garbage collector, Alvin Clark, that he was "going to kill that s.o.b." Senator Kennedy. (Rep. Tr. p. 7099.) In any event Dr. Diamond did not believe that appellant had made the foregoing statement; Dr. Diamond believed Mr. Clark was "incorrect" in his testimony, although he did not "know anything about the witness except for the statement." Recognizing "that Sirhan was

consciously selecting certain material to give [Dr. Diamond] and consciously withholding other material, because he didn't trust [him]," Dr. Diamond testified, "I prefer to believe Sirhan." (Rep. Tr. pp. 7099-7100.) Appellant had lied to others about his having been at the Ambassador Hotel on June 2d because he "didn't trust the other persons." (Rep. Tr. p. 7098.)

At the February 2, 1969 conference in Mr. Cooper's office, Dr. Diamond had stated that various members of the Sirhan family, including appellant, were giving Dr. Diamond "the grossest kind of evasion and deception" with respect to some matters. (Rep. Tr. pp. 7045, 7048.) Dr. Diamond also conceded that a psychiatrist does not necessarily obtain the truth from a subject who is under hypnosis; he may obtain "fantasies" and "outright lies." (Rep. Tr. p. 7175.) Hypnosis "must not be mistaken for truth serum." (Rep. Tr. p. 7176.) Nonetheless Dr. Diamond felt, "I think I had a fairly good idea of when [appellant] is lying and when he is telling the truth; and what he lies about and what he tells me the truth about." (Rep. Tr. p. 7056.)

Dr. Diamond believed appellant's statement

that, when he went to the Ambassador Hotel on June 2d, he "loved" Senator Kennedy. (Rep. Tr. p. 7132.) Dr. Diamond did not view appellant's visit to the shooting range on the day of the assassination as "indicative of some kind of premeditation and deliberation." (Rep. Tr. p. 7109.) Appellant fired at the range only because such activity was one of his "chief emotional outlets." (Rep. Tr. p. 7112.)

At the February 2d conference Dr. Diamond had also stated, "But all my clinical material points largely to this dissociative hysterical, rather than a psychotic picture," and "the hatred of the Jews is more than one would expect but I don't see it as a psychotic type of affair." (Rep. Tr. p. 7194.)

Dr. Diamond tried his "very best to get . . . through" to appellant "that the legal strategy of the defense is that there was no premeditation or deliberation." (Rep. Tr. p. 7108.)

## REBUTTAL

### A. Non-Clinical Evidence of Appellant's Condition on June 5, 1968, and at the Time of the Writing of the Notebooks

Sergeant Frank Patchett of the Los Angeles Police Department, who in the course of operating the

"drunk wagon" in the Central Los Angeles area had observed hundreds of persons who were under the influence of alcohol, observed appellant at the Rampart station briefly at approximately 12:45 a.m. on June 5, 1968. He also was one of the officers who drove appellant to the Police Administration Building at approximately 1:30 that morning. (Rep. Tr. pp. 7390-93.) Sergeant Patchett formed the opinion that appellant was not intoxicated, that he was "definitely" not under the influence of alcohol to any degree. He noticed no physical impairment on appellant's part other than a limp caused by a leg injury sustained during the scuffle. (Rep. Tr. pp. 7394-95.)

Sergeant Adolph Melendrez of the Los Angeles Police Department also observed appellant at the Rampart station at 12:45 a.m. and remained with him until the arraignment later that morning, speaking with him in close proximity. (Rep. Tr. p. 7381.) On the basis of his twenty-eight years' experience in police work, during which he had seen a great number of persons who were under the influence of alcohol, he formed the opinion that appellant was "completely sober." Sergeant Melendrez "detected no odor of alcohol. [Appellant's] demeanor was that of a sober man." (Rep. Tr.

pp. 7380, 7382.) Appellant was "very intelligent," "very coherent," and "[c]ertainly . . . wasn't confused." (Rep. Tr. pp. 7385-86.) Sergeant Melendrez could not detect anything which would indicate that appellant was "other than a normal person." (Rep. Tr. p. 7387.)

George Murphy, an investigator from the district attorney's office with twenty-three years' experience on the Los Angeles Police Department, was in the presence of appellant at the Police Administration Building from 2:00 a.m. to 6:00 a.m. on June 5th. Mr. Murphy was in close proximity to appellant, conversing with him, and likewise formed the opinion that "[t]here was no sign of intoxication." (Rep. Tr. pp. 7374-76.) Appellant was "very lucid" and calm and appeared as normal to Mr. Murphy as anyone he had ever dealt with on a homicide charge. (Rep. Tr. p. 7377.)

Mr. Sloan, the handwriting expert, was recalled and testified that he had compared appellant's notebooks and the envelope found in the trash area behind the Sirhan residence with the "automatic writing" samples which appellant produced under hypnosis for Dr. Diamond. Mr. Sloan "found no qualitative breakdown in the notebooks comparable to that which [he] saw in this exemplar of automatic writing," nor did he find such

breakdown in the writing on the envelope. (Rep. Tr. pp. 7426-28.) Mr. Sloan's comparison of the various writings led him to conclude that appellant's writing in the notebooks and on the envelope was not done in a state of hypnosis. (Rep. Tr. p. 7431.)

B. Psychological and Psychiatric Evidence

Mr. Leonard Olinger, a psychologist, read in the newspapers about the psychological testimony being given in the present proceedings and was "troubled by the kind of inferences made from that data" and by Mr. Schorr's "plagiarism." (Rep. Tr. pp. 8041, 8188-89, 8216, 8223.) To Mr. Olinger, some of that testimony appeared "unreliable" and "sounded as if it were unwarranted by the material that was being presented in support of it." (Rep. Tr. pp. 8213-14.) After contacting the district attorney's office and volunteering some information, he was furnished with a copy of the reports and testimony of Mr. Schorr and Mr. Richardson and portions of the testimony of the other psychologists who appeared in the present proceedings. (Rep. Tr. pp. 8050, 8189, 8214.)

There were ten basic precautions concerning

psychological testing which Mr. Olinger communicated to graduate students whom he instructed. It was Olinger's opinion that any clinical psychologist should observe them. (Rep. Tr. pp. 8059, 8061.) These consisted of (1) employment of a battery of tests rather than a single test, (2) strict adherence to prescribed procedures, (3) absolute integrity in test scoring, (4) care neither to overlook anything in the data nor to project into the data what is absent, (5) acceptance of the simpler explanation for a phenomena rather than seeking out the exotic explanation, (6) arriving at a diagnosis based on the actual data rather than fitting the data into a preconceived notion, (7) achieving a "global" view of the subject which would include socio-economic, educational, cultural, intellectual, and sexual factors as well as reference to the norm, so that a "highly biased impression" may be avoided, (8) avoidance of being consciously or subconsciously influenced by knowledge of the individual, (9) post-testing validation of blind test score analysis, and (10) employment of terminology which is objective rather than overly technical or overly emotional. (Rep. Tr. pp. 8061-73.)

Mr. Ollinger reviewed the results of the

battery of tests administered to appellant with the foregoing principles in mind. (Rep. Tr. p. 8098.) He concluded that Schorr's and Richardson's diagnoses were deficient in not adhering to various of these principles, in particular those numbered (2), (3), (4), and (10). (Rep. Tr. pp. 8062, 8064, 8103.) Both men, in Ollinger's opinion, overlooked "some strength or possible positives" in appellant's personality. (Rep. Tr. p. 8064.)

In the MMPI tests upon which Schorr and Richardson based their diagnoses, Ollinger found answers labeled "paranoid" which "might be explained more by the position or situation of Mr. Sirhan than by the actual test." For example, some of the test scores indicating depression and anxiety were attributable to the fact that, unlike different scores (obtained four months later), they were obtained within a month of appellant's arrest. If the various objectionable scorings were removed, appellant's profile would score "within the normal limits." (Rep. Tr. pp. 8109-15, 1887, 8121-23.) Moreover, a low score can be indicative of lack of motivation to perform the test, inattention to detail, or "the examiner's sub-interaction," in

addition to inability to perform the test. (Rep. Tr. p. 8132.)

Neither Schorr nor Richardson followed proper technique in administering the Wechsler test. (Rep. Tr. pp. 8136-38.) Some of their test scores actually show "personality strength" on the part of appellant. (Rep. Tr. pp. 8139-40.)

Ollinger found numerous instances of improper technique in Schorr's TAT test. (Rep. Tr. pp. 8142, 8146, 8151, 8153-55, 8157, 8162-63.) The cards selected by Schorr for display to appellant were likely to evoke depressive responses. (Rep. Tr. pp. 8153-55.) Many of those responses in which Schorr found significance, were common-sense and not unusual. (Rep. Tr. pp. 8149, 8152.) Of one of Schorr's conclusions, Ollinger testified, "there's a great deal read into the data which really is not present in the data." (Rep. Tr. p. 8149.) Similarly, Richardson's TAT test results were not highly unusual; they indicated neurotic rather than schizophrenic thinking on appellant's part. (Rep. Tr. pp. 8158-60, 8165-67.) Appellant's "blowups" in court also were more indicative of neurotic behavior than of schizophrenia. (Rep. Tr. p. 8097.)

There were "a number of apparent inaccuracies" in Schorr's scoring of the Rorschach test (Rep. Tr. pp. 8171-75), and the protocol prepared by Schorr was inadequate for review by other trained clinical psychologists. (Rep. Tr. pp. 8167-70.) The responses which appellant gave on Richardson's Rorschach were not unusual and suggested only the "barest hints" of schizophrenia. Rather that test was indicative of a neurotic condition. (Rep. Tr. pp. 8176-78, 8182.) What was unusual, and unprecedented in Ollinger's experience, was appellant's reference to "color shock" in responding to a Rorschach card proffered by Richardson. "It is almost as if [appellant] had somehow been instructed or advised or otherwise informed about this particular term." (Rep. Tr. pp. 8080-81.)

On the basis of the various tests administered by Schorr and Richardson, Ollinger would diagnose appellant as a "borderline schizophrenic with primary neurotic features." Ollinger concluded that appellant had capacity to form a specific intent to commit murder, to premeditate maturely and meaningfully, and to harbor malice aforethought. (Rep. Tr. pp. 8186-87.) Appellant also had "the mental capacity to comprehend his duty and to conform it to the dictates of society." (Rep.

Tr. p. 8235.)

Mr. Ollinger testified,

". . . I believe that if the various consultants were called in -- Dr. Crain, Dr. Howard, Dr. De Vos, Dr. Seward -- if they had been exposed to the full range of information that I had been exposed to; and if they had had drawn to their attention the same omissions, inconsistencies, ambiguities, contradictions and deficiencies in the material [of Schorr and Richardson]; that they would have altered the impressions which they ultimately gave." (Rep. Tr. p. 8236.)

Dr. Seymour Pollack, a psychiatrist, trained clinical psychologist, and specialist in hypnosis (Rep. Tr. pp. 7454, 7456-57, 7466), spent 24 hours examining appellant during the course of several personal interviews, observed appellant 17 hours in court, and devoted the balance of the 200 hours which he spent on the present case in interviewing members of the Sirhan family, reviewing taped conversations between appellant and police officers which took place during the first hours and days after appellant was

apprehended, reviewing appellant's notebooks, the observations of jail physicians, the psychological examinations, material from the files of the police, the district attorney's office, and the F.B.I., the testimony and interviews of witnesses, and materials on presidential assassinations. (Rep. Tr. pp. 7463-66, 7469-70, 7478, 7557.)

Dr. Pollack testified that "psychological tests by themselves aren't to be taken as absolute evidence in any way"; they are "material of significance in the over-all evaluation; . . . an additional bit of information" which "may or may not be very reliable." (Rep. Tr. pp. 7466-68.) He felt that "all psychological instruments -- these as well -- particularly projective tests, tend markedly to accent and exaggerate the so-called psychopathology." (Rep. Tr. p. 7764.)

The psychologists Seward and De Vos entered the case at the suggestion of Dr. Pollack, who felt that the psychological conclusions of Richardson and Schorr needed further evaluation in light of appellant's cultural background. (Rep. Tr. pp. 7474-76.)

Recognizing that appellant was "mentally disturbed," Dr. Pollack nevertheless concluded that "the assassination of Senator Robert Kennedy was

triggered by political reasons with which he was highly emotionally charged." (Rep. Tr. p. 7480.) Despite appellant's "traumatic experiences" during his early life, "at *no* time did [Dr. Pollack] *obtain from* either Sirhan or the family members any evidence of . . . traumatic trance or significant peculiar behavior." (Rep. Tr. p. 7482.) There was no

> ". . . material that indicates that Sirhan himself was exposed in any more severe or more intense situation tha[n] any other members of his family or any other members of the Arab community; no evidence that his emotional responses, which were those of fear, fright, were significantly different from others in any way except . . . . as being more tense, having more anxiety. . . ." (Rep. Tr. p. 7483.)

The "emotional disturbance" to which appellant and others were exposed was "not an everyday, constant circumstance." (Rep. Tr. p. 7484.)

Appellant's fall from the horse did not result in "any significant neurological behavior or personality change." (Rep. Tr. pp. 7529-30, 7532-33.)

There were no significant signs of severe character deviation or paranoia which would have been apparent to Dr. Pollack had he come in contact with appellant prior to the assassination, and Pollack "would not have been able to forecast in any way that Sirhan would have done what he did." (Rep. Tr. pp. 7485-86.)

The interest which appellant had expressed in Rosicrucian philosophy, mind power, and the occult

> ". . . was not only a consequence of his continued interest in exploring things about him, which he had always been interested in, but more particularly it was now Sirhan's way of exploring . . . , now that he felt that he was a failure in other ways, how he himself could become a success . . . , strong . . . , rich. . . ." (Rep. Tr. p. 7539.)

Dr. Pollack considered it significant that appellant was not "psychotically secretive" about his "very bizarre experiments," that appellant discussed them with his friends and his brothers, and that he did not firmly believe in them. (Rep. Tr. pp. 7541-43.)

Appellant's ideas concerning Senator Kennedy,

President Johnson, Ambassador Goldberg, the Arab-Israeli conflict, American Jews, and the United States' political system and foreign policy in the Middle East did not reflect delusional thinking, psychosis, or paranoia. (Rep. Tr. pp. 7521-23, 7607-08.)

Appellant "had dabbled with the idea of assassinating . . . other people" who shared the same pro-Israeli attitude as Senator Kennedy but decided that the Senator should be the person "initially" assassinated in preference to President Johnson and Ambassador Goldberg. (Rep. Tr. pp. 7547-48.) Dr. Pollack testified, "I don't believe that Sirhan expected to be caught. I don't believe he wanted to be caught" (Rep. Tr. p. 7549), and testified further (on cross-examination) that in his opinion appellant "would have possibly killed other people" had he been successful in escaping into the crowd at the scene of the assassination. (Rep. Tr. pp. 7937-38.)

In appellant's eyes Senator Kennedy was an "opportunist" who had "sold out" to pro-Israeli factions for political gain. (Rep. Tr. p. 7549.) Appellant "killed Kennedy because he hated him for what he stood for and . . . Sirhan . . . saw himself as a defender of the Arab cause." (Rep. Tr. p. 7574.)

Appellant told Dr. Pollack on several occasions that the Arab proverb, "'A friend of my enemy is my enemy,'" had "influenced him and was his philosophy of life; that he believed very, very strongly in this point of view." (Rep. Tr. pp. 7563-64.) Appellant was very much influenced by the television program in May of 1968 in which Senator Kennedy had detailed his pro-Israeli sympathies; this program convinced him to kill the Senator. (Rep. Tr. p. 7569.)

Dr. Pollack was "unable to accept Sirhan's denial of his recall for his written notes as a genuine amnesia" and interpreted it "as an attempt to avoid some serious condition that would be attributed to his writings, that would be interpreted as evidence of planning, premeditation of killing Kennedy." (Rep. Tr. pp. 7551, 7554.) Dr. Pollack believed "that much of the notebook material is doodling" and that appellant's repetitiveness, such as in his use of the phrase "'R.F. Kennedy must die,'" was indicative of "Sirhan's attempts to strengthen his intention, . . . his courage, . . . his capability to carry out his intention to kill Kennedy." This was "consistent" with what appellant had read in the fields of mind control, Rosicrucian philosophy, and self-hypnosis, with appellant's

experimentation in mind control, and with "all of this material read by him that emphasized that repetition of ideas by writing it would increase the writer's ability to execute even very difficult plans." Appellant had always been a "very sensitive young man" with a "high regard for human life" and had to overcome this conviction by building up his courage and intention to carry out his plan. (Rep. Tr. pp. 7554-56.) His repetition of the word "die" was the same for him as underscoring the word for emphasis. (Rep. Tr. p. 7940.)

Dr. Pollack formed the "definite opinion that none of these writings by themselves or in total are evidence of psychosis." (Rep. Tr. p. 7556.) He found in appellant's notebooks none of the bizarre qualities evidencing psychosis which he had found in many of the letters written by other political assassins or by persons who had threatened President Johnson. (Rep. Tr. p. 7557.)

In his interviews with Dr. Pollack, appellant "described" and "emphasized" as "currents feelings" all of the feelings which he expressed in the notebooks; yet appellant denied that the notebooks expressed feelings that he had had. To Dr. Pollack this

represented a "considerable degree of inconsistency." (Rep. Tr. p. 7565.)

Appellant's target practice at the shooting ranges "was carried out for the purpose of improving his shooting skill and improving his accuracy, with the intent at that time, and the hope, of killing Senator Kennedy." (Rep. Tr. p. 7569.) Appellant also "went to the Ambassador Hotel with . . . the conscious intention of killing Senator Kennedy." (Rep. Tr. p. 7570.) There was nothing indicating to Dr. Pollack that appellant "was under the influence of alcohol; it would appear entirely probable . . . that he took a few drinks in order to bolster his courage and to strengthen his resolution and capacity to kill Kennedy." (Rep. Tr. p. 7571.)

Dr. Pollack believed that the "possibility of a hypnotic trance" at the time appellant committed the assassination was "extremely remote," as was the "conjecture" that the notebooks had been written in such a trance. Appellant's behavior at the time of the assassination and at the time of the writing of the notebooks was "substantially different" from what would be expected from a hypnotized person and from appellant's behavior when he was hypnotized in the

presence of Dr. Pollack and Dr. Diamond. (Rep. Tr. p. 7572.)

Dr. Pollack hypnotized appellant on three occasions and was present on several occasions when Dr. Diamond hypnotized appellant. (Rep. Tr. pp. 7580-81.) Dr. Pollack believed that he and Dr. Diamond were successful in actually hypnotizing appellant. However, under hypnosis the subject can "lie, deceive, fantasy, tell tall tales. He can do anything that he would do in his usual state." (Rep. Tr. pp. 7582-83.) Appellant was capable of "blocking" the questions of the two psychiatrists while under hypnosis. He gave little information spontaneously; often he would not answer a question, and all of what he did offer was obtained by question and answer. While under hypnosis appellant was still thinking and reasoning, which explained his not answering questions involving matters which he did not wish to discuss and which also explained his tendency to fall asleep when asked certain questions. (Rep. Tr. pp. 7591-92.) Appellant was "able to think" at the time he prepared the "automatic writing" for Dr. Diamond in Dr. Pollack's presence. (Rep. Tr. p. 7598.) This writing was not indicative of bizarre or psychotic thinking. (Rep. Tr. pp.

7602-03.)

The fact that appellant was so easily hypnotized suggested that he was not severely or psychotically disturbed, since it is "very difficult" to hypnotize an individual who is actually psychotic. (Rep. Tr. pp. 7583, 7585.) Although appellant's Rosicrucian experiments had facilitated his being hypnotized by the psychiatrists, they did not therefore lessen the likelihood that appellant was not psychotic, because it would be very difficult for a psychotic person to hypnotize himself. (Rep. Tr. pp. 7586-88.)

The theory of appellant's having "a dissociate mind" at the time of the assassination was likewise considered only a remote possibility by Dr. Pollack. (Rep. Tr. pp. 7574-75.) Appellant "at no time" underwent a "definite break with reality." (Rep. Tr. p. 7565.) Appellant's belief "that there was some way of influencing events through this power of the mind" did not constitute "bizarre ideas that would have led [Dr. Pollack] to conclude that he was psychotic." Dr. Pollack "could find no evidence of the peculiar and bizarre thinking that [he] would consider to be evidence of psychotic thinking or

psychosis." (Rep. Tr. pp. 7567-68.)

Dr. Pollack testified, "there is very good evidence to influence my opinion that immediately after and for some time after his arrest that Sirhan was not amnesic." (Rep. Tr. p. 7562.) Appellant's remarks in the kitchen pantry that he could "explain" and that he had acted for his country indicated an absence of amnesia, as did appellant's behavior in police custody on June 5, 1968. (Rep. Tr. pp. 7579-80.) Moreover, even if appellant had had genuine amnesia it would be of the retrograde type and thus would not be "significantly related to any substantial mental disturbance at the time of the shooting." (Rep. Tr. pp. 7576, 7578.)

Falsely claimed amnesia "is a very, very common substitute for denial" of an allegation of criminal conduct, and appellant's persistent claim of amnesia was seen by Dr. Pollack as a "particular method to avoid full legal repercussion." (Rep. Tr. pp. 7573, 7575.) Appellant "was aware that if he could raise enough doubt that he had the intent to kill Kennedy when he shot him, that he would be able to avoid major legal consequences." Dr. Pollack's "clinical picture of Sirhan then is that of a more

logical reasoning person who recognizes his legal predicament and who has the mental capability of protecting himself in a rational fashion even though he has a paranoid personality problem." (Rep. Tr. p. 7575.)

Dr. Pollack explained that paranoid traits can be present "in normal people, people who have what we call neurosis." It is only when these traits are present to a greater degree that there exists a mental illness or a psychotic condition, which is a severe or more apparent kind of mental illness. (Rep. Tr. pp. 7506-07, 7509.) The term "mental illness" is merely a "description of how the individual is behaving," i.e., that his "emotional difficulties" or "mental problem" has become more apparent in his everyday behavior. (Rep. Tr. pp. 7507, 7510.)

It was Dr. Pollack's opinion that appellant was not "shy, withdrawn, or what is in psychiatric terms a 'schizoid' person who lives within himself, who withdraws to a very marked degree from the world, who has difficulties in his personal and interpersonal relationships." (Rep. Tr. pp. 7537-38.) Significantly appellant was not controlled by fantasies and did not withdraw by remaining continuously in his room

alertness, memory, or associations prior to the date of the assassination, the fact that appellant asked and answered certain questions both immediately prior to and subsequent to the assassination, the adequate planning undertaken by appellant, the testimony of witnesses to the effect that appellant's emotions did not appear very disturbed at the time of the assassination, the particular motives which impelled appellant's act, and Dr. Pollack's opinion that appellant's writings were not indicative of psychosis. (Rep. Tr. pp. 7668, 7670-71, 7681-87.)

Dr. Pollack testified that at the February 2, 1969, conference among the various psychiatrists and psychologists, "Dr. Diamond expressed a great deal of anger and resentment at my not committing myself." (Rep. Tr. p. 7768.)

PENALTY PHASE

The prosecution offered no additional evidence at the penalty phase of the proceedings. (Rep. Tr. p. 8878.)

The only additional evidence offered by the defense was further testimony by appellant's mother, Mrs. Mary Sirhan. In response to the single

question posed by the defense, "In his entire life, before this shooting, was Sirhan Sirhan ever at any time in any trouble with the law?", she testified, "He has never been. And that is not from me or from him. That is because I raised him up to the law of God and his love." There was no cross-examination of Mrs. Sirhan. (Rep. Tr. p. 8879.)

## CONTENTIONS ON APPEAL[3/]

### Relative to the Guilt Phase

Appellant contends that:

1. The trial court, with respect to appellant's two unsuccessful attempts to enter a plea of guilty, committed error in

(a) rejecting appellant's pretrial offer to plead guilty to first-degree murder upon condition that appellant be guaranteed a life sentence,

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3/ In the interest of clarity, the listing of appellant's contentions is organized in the manner in which the contentions are answered in Respondent's Brief, rather than in the order in which they appear in Appellant's Opening Brief. The arguments in Respondent's Brief are cross-referenced to those in Appellant's Opening Brief.

(b) denying appellant's motion for mistrial founded upon pretrial publicity concerning the possible plea of guilty,

(c) permitting the prosecution to introduce in evidence before the jury appellant's admission of guilt, made previously in court outside the presence of the jury, at a time when appellant was seeking to enter an unconditional plea of guilty, and

(d) refusing to bar the prosecution, in its argument to the jury at the penalty phase, from urging death as the proper punishment after the prosecution had expressed willingness to accept a plea of guilty conditioned upon a life sentence;

2. The evidence "unequivocally" indicates diminished mental capacity on the part of appellant, and therefore he should have been convicted of only manslaughter or, at most, second-degree murder;

3. The seizure of

(a) the notebooks from appellant's room, and

(b) the envelope from the trash area behind the Sirhan residence

was unlawful under the Fourth and Fourteenth Amendments to the federal Constitution;

4. The prosecution's decision to proceed against appellant by way of grand jury indictment rather than preliminary hearing and information deprived him of due process of law and equal protection of the laws under the Fourteenth Amendment;

5. The alleged exclusion of racial minorities and other identifiable segments of the general population from

(a) the grand jury which indicted appellant, and

(b) the jury venire from which the jury that tried appellant was selected

deprived him of due process of law and equal protection of the laws under the Fourteenth Amendment;

6. The trial court deprived appellant of a fair trial by refusing to hold an evidentiary hearing on the issue whether the exclusion of jurors opposed to capital punishment resulted in an unrepresentative jury at the guilt phase and increased the likelihood of appellant's being convicted;

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Relative to the Penalty Phase

Appellant contends that

7. His punishment was fixed by a jury from which prospective jurors were improperly excluded, because of their views on capital punishment,

(a) by the trial court's excusal of certain jurors for cause, and

(b) by the prosecution's use of peremptory challenges to certain other jurors;

8. The trial court erred in excluding testimony relative to the "social, historical, economic, and political dimensions of the Arab-Israeli conflict during the Sirhan childhood in Palestine";

9. The absence of fixed standards to guide the jury in deciding between the death penalty and life imprisonment denied appellant due process of law and equal protection of the laws under the Fourteenth Amendment;

10. The death penalty constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments; and

11. This Court should exercise discretion to reduce appellant's punishment to life imprisonment.

## ARGUMENT

## I

## THE TRIAL COURT DID NOT ERR WITH RESPECT TO APPELLANT'S TWO UNSUCCESSFUL ATTEMPTS TO ENTER A PLEA OF GUILTY

### A. Appellant Had No Constitutional or Other Right to Enter a Plea of Guilty to First-Degree Murder Conditioned Upon His Being Guaranteed a Life Sentence

Appellant contends that the trial court's "rejection of the negotiated plea denied appellant equal protection of the law" and further constituted "an abuse of discretion." (App. Op. Br. pp. 287, 329.)

After selection of the jurors but prior to selection of the alternate jurors, a conference was held in chambers at which appellant's counsel indicated that they and their client were prepared to have him "plead guilty and accept a life sentence." (Rep. Tr. p. 2651; see also Rep. Tr. pp. 2867, 2876-77, 2879-84.) Appellant, on the advice of his counsel, dropped his initial demand that he be "guaranteed a parole at the end of 7 years." (Rep. Tr. p. 2883.) For various reasons, detailed in conjunction with subargument I(D) herein, the prosecution (including

District Attorney Younger personally) concurred in the request for a life sentence upon a plea of guilty. (Rep. Tr. pp. 2651-52, 2657-58; see also Rep. Tr. pp. 2660, 2868-73, 2877, 2885-86.) However, the trial court declined to accept the conditional plea, stating:

> ". . . I have given this a great deal of thought . . . but the ramifications of this thing I think should be thoroughly given to the public. I appreciate the cost. I appreciate the sensation, but I am sure it would just be opening us up to a lot of criticism and criticism by the people who think the jury should determine this question.
>
> "We have a jury and whatever expense is incurred from here on out would only be negligible with what I think would be incurred if we did otherwise. Obviously, in open court if there was a plea of murder, then you could have a trial to determine the degree and the penalty, that would be all right with me." (Rep. Tr. pp. 2658-59.)
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> ". . . I think you have got a very much interested public but I don't let the public influence me but, at the same time, there are

a lot of ramifications and they continually point to the Oswald matter and they just wonder what is going on because the fellow wasn't tried. I'm not concerned with this penalty. If they come out with second, that is all right with me. That is the jury's business . . . ." (Rep. Tr. pp. 2659-60.)

". . . . I have thought about it practically continually since I felt that the matter of penalty should be tried by a jury." (Rep. Tr. p. 2874; see also Rep. Tr. p. 2877.)

Although "our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons," Griffin v. Illinois, 351 U.S. 12, 17, appellant has failed to demonstrate how he or any group of which he is a part has been treated differently, let alone invidiously discriminated against, in not being permitted to plead guilty to a capital offense with the guarantee of a life sentence.

There was nothing arbitrary or capricious in the above-quoted reasons advanced by the trial court in denying the conditional plea proffered by appellant.

See Oyler v. Boles, 368 U.S. 448, 456. Although these reasons were in part based upon the extraordinary nature of appellant's case and its impact on the administration of justice, this does not give rise to a claim of denial of equal protection of the laws.

> ". . . To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' . . ."
>
> Rinaldi v. Yeager, 384 U.S. 305, 309.

Appellant characterizes the lack of fixed standards to guide a trial court in determining whether to accept such a conditional plea as analogous to the lack of fixed standards to guide juries in determining the issue of punishment in a capital case. (App. Op. Br. pp. 329-30.) Yet this Court in rejecting the constitutional attack on the latter procedure noted the numerous decisions upholding against constitutional attack the unguided discretion of trial courts in non-capital sentencing.

In re Anderson, 69 Cal. 2d 613, 626.

With reference to appellant's constitutional claim, the following recent statement by the United States Supreme Court is significant:

> "Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, see Lynch v. Overholser, 369 U.S. [705,] 719 [(1962)] (by implication), although the States may by statute or otherwise confer such a right. . . ."
>
> North Carolina v. Alford, 400 U.S. 25, 38(n.11).

California has not conferred by statute, or otherwise, the nonconstitutional right mentioned in the Alford opinion. On the contrary, Penal Code section 1192.3 provided[4/] expressly that appellant's plea

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4/ Repealed in 1970 when the expanded provisions of Penal Code section 1192.5 were enacted, section 1192.3 provided:

> "Upon a plea of guilty to an information or indictment for which the jury has, on a plea of not guilty, the power to recommend, the discretion of imposing, or the option to impose a certain punishment, the plea may specify the punishment to the

of guilty, specifying the punishment, could be entered only in the event "such plea is accepted by the prosecuting attorney in open court and is approved by the court."

The trial court's responsibility to determine the matter of punishment, rather than leave it to stipulation by the parties, is further indicated by Penal Code sections 12 and 13. Section 12 declares that "The several sections of this Code . . . devolve a duty upon the Court authorized . . . to determine and impose the punishment prescribed," and section 13 declares that "Whenever in this Code the punishment for a crime is left undetermined between certain limits, the punishment . . . must be determined by the Court authorized to pass sentence."

The exercise by trial courts of "discretion as to meaningful sentencing alternatives" in plea bargaining was recognized by this Court in People v. West, 3 Cal. 3d 595, 605, with specific reference to former section 1192.3 and section 1192.5. Id.,

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same extent as it may be specified by the jury on a plea of not guilty. Where such plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant cannot be sentenced to a punishment more severe than that specified in the plea."

607-08. In fact, were the parties free by statute to bind the trial court in fixing a defendant's punishment, the separation of powers mandated by the California Constitution might be impaired.

See People v. Tenorio, 3 Cal. 3d 89.

There is "recognition--implied in statutes and express in decisional authority--that the judicial power must include the power to control a cause." People v. Tenorio, supra at 93. Inherent in this judicial power is the right to reject a plea of guilty.

People v. Clark, 264 Cal. App. 2d 44, 46-47.

It was a proper exercise of discretion for the trial court to consider the factors it did. "Judicial discretion is that power of decision exercised to the necessary end of awarding justice." People v. Surplice, 203 Cal. App. 2d 784, 791. The trial court was correct in taking into account the "community's need[s]" in exercising discretion on this matter affecting punishment, People v. Smith, 259 Cal. App. 2d 868, 873, and the public's right to know. This Court may take judicial notice of the confusion and speculation that have ensued from the conviction of Reverend Martin Luther King's assassin upon a plea of guilty without any public airing of the underlying

facts. Evid. Code §§ 451(f), 459.

The case of People v. Bravo, 237 Cal. App. 2d 459, 461, relied on by appellant "as removing all discretion from the court" (App. Op. Br. p. 301), holds only that once the trial court has accepted a guilty plea it is bound thereby. Id., 461-62.

Respondent submits that the trial court did not err in refusing to accept appellant's conditional plea of guilty, and that there is no support in the record for appellant's innuendo (App. Op. Br. pp. 309, 339) that the proffered plea was arbitrarily rejected merely because the trial court desired to preside over a "sensational case" and had a "phobia concerning fancied public criticism."

B. Having Taken All Possible Steps to Ensure the Secrecy of the Unsuccessful Plea Negotiations, the Trial Court Did Not Err in Denying Appellant's Motion for Mistrial Founded Upon the Nonprejudicial Pretrial Publicity Which for Unknown Reasons Ensued

Appellant contends that the trial court erred in denying his motion for mistrial founded upon pretrial publicity concerning the possible plea of guilty. (App. Op. Br. p. 212.)

At the conclusion of the aforementioned

proceedings, which took place in chambers, the trial court ordered that the record of these proceedings be sealed. (Cl. Tr. p. 185; Rep. Tr. p. 2661.)

Later that day, February 10, 1969, at another conference in chambers, the trial court indicated that it did not intend to begin sequestering the jury until 8:00 p.m. on February 12th since alternate jurors remained to be picked on February 11th (Cl. Tr. p. 186) and February 12th was a legal holiday. (Rep. Tr. p. 2726.) Immediately following the trial court's remark, defense counsel addressed the court but voiced no objection to the court's intended action. (Rep. Tr. p. 2727.) On the morning of February 11th the alternate jurors were picked and sworn. (Cl. Tr. p. 186.) Defense counsel likewise did not object later that morning when the trial court adjourned the proceedings with the following statement to the jurors and alternates: "Now I know you don't want to go to a hotel this noon and stay there all this afternoon and all day tomorrow, tomorrow being a holiday; I am going to ask you to report to the Biltmore Hotel not later than 8:00 o'clock tomorrow evening." (Rep. Tr. pp. 2854-55.)

Upon taking the adjournment the trial court

further cautioned the jurors:

> "You are again admonished you have a duty not to converse among yourselves or with anyone else on this matter or anything pertaining to it. You are not to form or express an opinion until the matter is finally submitted to you for that purpose.
>
> "You are not to read any newspaper or any other written article or listen to any TV or radio broadcast related to this case, and if you should inadvertently see or hear such report, you are to disregard it and not permit it to influence you in your deliberations."[5/]

(Rep. Tr. p. 2855 (emphasis added).)

When the court reconvened on the morning of February 13, 1969, following the holiday recess, a conference was held in chambers relative to publicity

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5/ The trial court subsequently noted that this admonition had been given "on numerous occasions, at each and every adjournment throughout this matter" (Rep. Tr. p. 2890) and that each of the jurors had indicated on voir dire that he would be uninfluenced by what he had heard or read outside the court, that he could be a fair and impartial juror, and that he could decide the case solely on the evidence produced in court and the law as given by the trial court. (Rep. Tr. pp. 2921-22.)

that had occurred regarding the confidential plea negotiations of February 10th. (Rep. Tr. pp. 2856-57, 2863-95.)

At this conference defense counsel represented to the court that none of the information which formed the basis for the objectionable publicity had emanated from the defense. (Rep. Tr. p. 2884.) The prosecution represented that it was not responsible for the release of this information. (Rep. Tr. p. 2885.) The trial court indicated that it was unaware of how the information had been released to the news media (Rep. Tr. p. 2885), remarking:

> "Someone, some way -- who it is I don't know and I'm not going to try to find out -- has revealed everything that went on in these chambers, in spite of the fact that I sealed the record." (Rep. Tr. p. 2888.)
>
> "I am sure none of my staff told it. I am sure of it." (Rep. Tr. p. 2894.)

Thereafter, in open court but outside the presence of the jury, appellant moved for mistrial on the ground of publicity. (Rep. Tr. p. 2896.) In support of this motion the defense offered in evidence five editions of the Los Angeles Times of February 12,

1969, bearing a headline on the front page, "Sirhan Guilty Plea now appears likely.'" (Rep. Tr. p. 2897.) Also offered in evidence by the defense were scripts or transcripts of radio broadcasts in the Los Angeles area, each referring to current "rumor" or "speculation" that appellant might enter a plea of guilty.[6/] (Rep. Tr. pp. 2897-2902.)

The trial court, at the request of defense counsel (Rep. Tr. pp. 2923-25), examined each of the jurors and alternate jurors individually in chambers.[7/] (Rep. Tr. pp. 2927-79.) Thereafter the trial court denied the motion for mistrial (Cl. Tr. p. 188; Rep. Tr. p. 2997), holding:

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6/ Appellant's Opening Brief sets forth the newspaper article (at pp. 239-44) and portions of the radio reports (at pp. 245-46).

7/ Inspector Conroy of the Los Angeles Sheriff's Office was also called as a witness by the trial court. He testified that he was in charge of arrangements for the jurors during the time they were sequestered. The jurors and alternates did not have television, radio, or telephones in their rooms at the hotel where they stayed. They had access to a telephone under the supervision of a deputy sheriff and to newspapers from which stories, relating to the present proceedings, were excised. A television was available to them in each of two recreations rooms but had cut-off switches monitored by deputy sheriffs. (Rep. Tr. pp. 2981-85.)

". . . I think the record would show that practically everyone, if not everyone's responses to questions by the Court said they could set aside these matters if they did hear them and decide the case only on the evidence produced here in court and the law as stated to them by me . . . ."
(Rep. Tr. pp. 2996-97.)

See People v. McKee, 265 Cal. App. 2d 53, 57, 59.

Appellant's Opening Brief is incorrect in several respects in stating (at p. 217) that "nine regular jurors and three alternate jurors had learned of appellant's intention to plead guilty to first degree murder and at least one regular juror indicated that it would be difficult to return a verdict of less than first degree murder after exposure to said aforementioned publicity."

First, appellant omits to state that the one juror (Mr. Evans), whose responses appellant stresses (App. Op. Br. pp. 217, 247-50) as indicative of an inability to return less than a verdict of guilty of first-degree murder, was excused because of the death of his father and never participated in the deliberations

leading to the guilt verdict. (Cl. Tr. pp. 251-52; Rep. Tr. pp. 8719-20, 8739.) Also excused, because of serious illness, was another juror (Mr. Morgan) who had some slight exposure to the publicity.[8/] (Cl. Tr. p. 227; Rep. Tr. pp. 7369-70. Cf. App. Op. Br. p. 252.)

Secondly, only four (not nine) jurors learned of the news media reports that appellant might enter a plea of guilty.[9/] Of the other jurors, two had heard

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8/ The names of the jurors who ultimately participated in the two verdicts are reflected in the polling of the jury. (Rep. Tr. pp. 8849-51, 8940-41.) There is no evidence or argument advanced by appellant indicating that either of the excused jurors influenced the jury to the detriment of appellant.

9/ Juror Elliott did not read the newspaper, hear the radio, or observe television. Someone mentioned to him "[s]omething sort of peculiar, about a guilty plea or something like that but I didn't pay any attention to that." Three or four persons told him, "'Well, you may be there for a week,'" predicating their statement on a newspaper article. (Rep. Tr. pp. 2946-47.) Juror Bortells "tried not to listen to people" but was "told it was possible that it wouldn't last very long" because "there was some arrangement" between counsel as to sentence by which appellant was going to plead guilty. (Rep. Tr. pp. 2947-49.) Juror Glick heard "something" over the radio "to the effect that the defendant was pleading guilty." He had not read the newspaper story. (Rep. Tr. pp. 2952-53.) Juror Broomis saw the newspaper headline and was told by his wife that "Sirhan pled guilty" according to a radio broadcast. (Rep. Tr. pp. 2958-59.) Each of these four jurors indicated, however, that the limited publicity to which he had been exposed would not influence him or cause him to

absolutely nothing,[10] and two jurors only were approached by persons who started to say something about the case but were stopped by the juror. One of these jurors saw her mother carrying a newspaper but noticed only the word "Sirhan."[11] Two jurors were told only that the trial might not last as long as contemplated and another juror that there might not be a trial, but none of these jurors attached substantial significance to the remarks.[12] The remarks of the remaining juror are somewhat equivocal but are viewed by respondent as reflecting no exposure to the objectionable publicity.[13]

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form an opinion about the case, and that he would set aside anything he had heard and decide the case solely on the evidence presented in court and the law as stated by the trial court. (Rep. Tr. pp. 2946, 2949, 2952, 2954, 2959-60.)

10/ Juror Martinez (Rep. Tr. pp. 2942-43) and Juror Grace (Rep. Tr. pp. 2956-57).

11/ Juror Frederico (Rep. Tr. pp. 2935-37) and Juror Stillman (Rep. Tr. pp. 2970-74).

12/ Juror Brumm (Rep. Tr. pp. 2933-35), Juror Stitzell (Rep. Tr. pp. 2960-64), and Juror Busby (Rep. Tr. pp. 2937-39).

13/ Juror Galindo in effect indicated to the trial court that none of the publicity had reached him and that no mention had been made to him of the newspaper article. Then he was asked by defense counsel, "Did you by any chance see the headline in the Times yesterday?" Mr. Galindo responded, "Yes. I think I was going home but I decided not to go because I was

Thirdly, appellant errs in stating that the jurors enumerated by him "had learned of appellant's intention to plead guilty to first degree murder" (App. Op. Br. p. 217 (emphasis added)), because not one of the twelve jurors who participated in the verdicts indicated that he had heard of the degree of the offense involved in the possible plea. In other words those four jurors who were exposed to some publicity gave no indication that they were informed that the contemplated plea was one of first-degree murder as opposed to second-degree murder or manslaughter.

This circumstance is very significant in evaluating appellant's claim of error. Apparently none of the jurors read the newspaper article; those who were exposed to the publicity were either directly

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close to coming here and I decided I'd better not." (Rep. Tr. pp. 2944-45.) Respondent submits that Mr. Galindo's reply, "Yes," in conjunction with the words that follow, indicates either a typographical error in the record or a failure on his part to give a responsive answer to the question. This conclusion is supported by the fact that the court and counsel failed to ask Mr. Galindo any of the questions, relating to his ability to remain uninfluenced by the exposure to publicity, which they directed to each of the jurors who admitted being so exposed. Moreover, it is significant that in making his argument on the motion for mistrial, defense counsel specified the individual jurors who he thought had been exposed to the publicity, and concluded "Those were the jurors that responded that they had heard something about it" without mentioning Juror Galindo. (Rep. Tr. pp. 2987-89.)

or indirectly made aware of the newspaper headline or one of the radio reports. The record indicates that neither the newspaper headline nor the radio reports mentioned the nature of the contemplated plea as one of guilty to first-degree murder; this was mentioned only in the body of the newspaper article. (See App. Op. Br. pp. 239-46.)

The record indicates that each of the jurors attempted to obey the trial court's admonition not to let himself be exposed to reports of the news media concerning the trial. The inadvertent exposure of some jurors to radio reports or commentary by their friends concerning these reports would not, and did not, communicate the nature of the contemplated plea as involving first-degree murder. Thus the jurors could have learned of the nature of the plea only in the event they (inadvertently) observed or were informed of the newspaper headline and then, in violation of their oath, deliberately sought to inform themselves further by reading the body of the article. All indications from the record are that this did not happen, People v. McKee, supra, 265 Cal. App. 2d 53, 57, 59, and that at most four jurors were aware that appellant might enter some kind of plea.

As one of the defense counsel himself noted,

> ". . . here the defendant has told this jury in examining it on voir dire in as honest a way as counsel could, that we were not seeking an acquittal, but that they had to determine whether it was murder in the first degree, murder in the second degree or manslaughter; that's the only issue." (Rep. Tr. pp. 2917-18.)

Thus the publicity as to a possible plea could not have informed the jury of anything they did not already know relative to the issue whether appellant had killed Senator Kennedy, and it would be just as natural for the jurors in question to believe that the contemplated plea was one to second-degree murder (or manslaughter) as to first-degree murder.

Appellant cites voluminous authority in support of the general proposition that it is reversible error for a trial court to permit prejudicial pretrial publicity to impair the defendant's right to a fair and impartial trial by jury. However, appellant ignores the fact that none of these cases lend support to his contention that error was committed in the present proceedings; the cited decisions all turn upon

affirmative error by a trial court, or its failure to take proper measures to ensure the defendant's constitutional right to a fair trial.

Thus in Sheppard v. Maxwell, 384 U.S. 333, the United States Supreme Court noted that the "carnival atmosphere at trial could easily have been avoided"; "the court should have insulated the witnesses"; and "the court should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion." Id., 358-59. Also cited by appellant and clearly distinguishable are,

E.g., Estes v. Texas, 381 U.S. 532 (reversible error to permit the televising of the defendant's trial over his objections);

Turner v. Louisiana, 379 U.S. 466 (reversible error to assign principal prosecution witnesses in capital case as bailiffs in charge of the jury);

Rideau v. Louisiana, 373 U.S. 723 (reversible error to deny change of venue in a capital case after the small community in which the

trial was held had been repeatedly exposed to the defendant's televised in-custody confession, which was not received in evidence);

Irvin v. Dowd, 366 U.S. 717 (reversible error to deny change of venue after police had released press releases stating that the defendant had confessed to six murders);

Silverthorne v. United States, 400 F.2d 627, 639 (9th Cir. 1968) (error for trial court to fail to examine jurors individually as to their information concerning the case and the source of their knowledge);

Mares v. United States, 383 F.2d 805, 809 (10th Cir. 1967) (same);

Maine v. Superior Court, 68 Cal. 2d 375 (trial court's erroneous denial of change of venue);

People v. Lambright, 61 Cal. 2d 482 (trial court's erroneous instruction that jury had right to hear and observe news media accounts of the trial).

Other cases cited by appellant are distinguishable for various reasons, such as their involving affirmative misconduct by jurors (bringing inadmissible newspaper accounts into the jury room) or having been decided on

nonconstitutional grounds.

The present case provides a marked contrast to the authority on which appellant relies. The trial court took every reasonable precaution and was, in the words of defense counsel, "as careful as a Judge could humanly be in this case" "to see to it that this trial is a fair trial." (Rep. Tr. p. 2917.) There was an order, in effect since June 7, 1968, restricting the dissemination of publicity concerning the case (Rep. Tr. pp. A-38-42, A-50 (modified); Cl. Tr. pp. 17, 35-37, 49), and the record of the in-chamber conference at which the plea negotiations took place was sealed. (Cl. Tr. p. 185; Rep. Tr. p. 2661.) As previously indicated, the jury was properly cautioned by the trial court relative to out-of-court information concerning the case, both prior to and subsequent to the occurrence of the objectionable publicity. The defense never requested sequestration of the jurors prior to selection of the alternates, nor did it seek a change of venue or a continuance as a result of the incident in question.

Cf. People v. Tidwell, 3 Cal. 3d 62, 68-69; People v. O'Brien, 71 Cal. 2d 394, 399-401.

The view of appellant's trial counsel was

that the publicity was

> ". . . not the fault of the Court, it's not the fault of counsel for the defendant, and I am not accusing [prosecution] counsel . . . either.
>
> "As I say, I am not pointing the finger at anyone. I don't know where it came from." (Rep. Tr. p. 2919.)

The obvious question, then, is whose alleged error is appellant seeking to have reviewed as the basis for reversal of the judgment? If it is the news media's "error," the following observation seems well in point:

> "The right to publish a prejudicial article does not carry with it the right of an accused to an automatic mistrial. Such an outcome would give to the press a power over judicial proceedings which may not be countenanced. . . ."
>
> Mares v. United States, supra, 383 F.2d 805, 808 (10th Cir. 1967).

Moreover if the news media "erred," its error may well have been nothing more than an exercise of the customary journalistic talent for deduction and surmise. Unless it was members of the Sirhan

family who revealed the pending plea negotiations (and the newspaper article indicates contact between the family and the press at this time, App. Op. Br. pp. 239, 244), it appears that the newspaper story did not result from a leak of information; as previously indicated, those present at the in-chambers conference represented that they they were not responsible for the disclosure. It is quite conceivable that the newspaper story was merely the result of logical deductions having been drawn from observable facts. The delay in proceeding with the trial was noticeable, and as the trial court observed after the conference but prior to the news media reports, "the District Attorney shows up this morning and everybody outside is saying, 'Why was the District Attorney up there?'" "We've got a lot of smart people out there." (Rep. Tr. p. 2728.) "I said he came to show me his respect, but they know that isn't the truth." (Rep. Tr. p. 2729.) The news reports in question are couched in terms of belief, surmise, and speculation. That this was indeed their origin is suggested by the fact that the newspaper article suggests that a guilty plea would probably be entered with "an understanding or a firm belief that a life term would be the maximum

penalty," while stating the belief that the trial court was "inclined to accept the change of plea, with the understanding that the matter would proceed immediately to some form of penalty trial before a jury." (App. Op. Br. pp. 239, 240.) In fact, as is apparent from the foregoing, this belief was erroneous since defense counsel were agreeable to a guilty plea only in the event there would not be a penalty trial before a jury.

Finally, even if it be assumed that error of a constitutional magnitude occurred when four of the jurors learned of the negotiations for entry of a guilty plea of an unspecified nature, it is clear beyond a reasonable doubt that such error was not prejudicial and would not require reversal of the judgment. Harrington v. California, 395 U.S. 250, 254; Chapman v. California, 386 U.S. 18, 21-24; People v. McKee, supra, 265 Cal. App. 2d 53, 57, 59. This is because evidence of appellant's courtroom outburst, in which he stated, "'I killed Robert Kennedy wilfully, premeditatively, and with twenty years of malice aforethought,'" was properly received in evidence before

the jury.[14/] (See subargument I(C) herein.) Thus the pretrial publicity concerning the possible plea could not have had any effect on those four jurors aware of it once they were presented with the aforementioned testimonial confession, a piece of self-inculpation far more probative than the earlier speculation which they were duty-bound to disregard.[15/]

Cf. People v. Cotter, 63 Cal. 2d 386, 398, vacated, 386 U.S. 274;

People v. Jacobson, 63 Cal. 2d 319, 330-31, cert. denied, 384 U.S. 1015.

C. The Trial Court Properly Permitted the Prosecution to Cross-Examine Appellant as to His Previous Courtroom Outburst in Which He Had Admitted His Guilt and Again Sought to Plead Guilty

Appellant contends that the trial court erred

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14/ Appellant's courtroom outburst was not a direct result of the trial court's refusal to accept appellant's previously proffered offer to plead guilty with the guarantee of a life sentence, nor was it a product of the publicity which attended the rejected plea. See Parker v. North Carolina, 397 U.S. 790, 795-96.

15/ Interestingly, appellant sought (unsuccessfully) to introduce, at the penalty phase, evidence of the plea negotiations. (Rep. Tr. pp. 8859-67.) See Pen. Code § 1192.4.

in permitting the prosecution to introduce in evidence before the jury appellant's prior admission of guilt made at a time when he was seeking to enter an unconditional plea of guilty. (App. Op. Br. p. 264.)

On cross-examination (in the presence of the jury) appellant was asked if he was sorry that Senator Kennedy was dead. He replied, "I'm not sorry, but I'm not proud of it either." In response to a further question appellant admitted having previously stated during the course of the trial (outside the presence of the jury), "'I killed Robert Kennedy wilfully, premeditatively, and with twenty years of malice aforethought.'" (Rep. Tr. pp. 5336-37.)

At this point defense counsel specifically stated at bench that the question was not objectionable but that the context in which appellant's statement was made should be introduced. Defense counsel then stated that the context of the statement could instead be brought out on redirect examination, and the trial court properly agreed. (Rep. Tr. p. 5337.)

On redirect examination defense counsel examined appellant further regarding the statement, eliciting the circumstances under which it had been made. Defense counsel introduced the entire colloquy

which had occurred between appellant and the trial court at the time, which indicated that appellant was then "very angry" with his attorneys for wanting to call certain witnesses, sought to dismiss his counsel and enter a plea of guilty, and planned to offer no defense. (Rep. Tr. pp. 5339-41, 5345-46.) It was when the trial court then asked appellant for his reason for wanting to so plead, that appellant made the statement in question. (Rep. Tr. p. 5347.) The court refused to accept the plea and ordered that the trial proceed, finding appellant incapable of representing himself. (Rep. Tr. pp. 5348-51.) Thereafter, after conferring with his mother and an advisor, appellant agreed to proceed with the trial, represented by his counsel, once they agreed not to call two girls as witnesses. Appellant subsequently was "very much" satisfied with his attorneys. (Rep. Tr. pp. 5353-54, 5357.)

When the trial court, after the aforementioned cross-examination and redirect examination of appellant, instructed the jury that appellant's in-court admission was "not to be considered as to the truth or falsity thereof, but only the fact that the statement was made," defense counsel objected and asked the trial court to

instruct the jury that the statement could be considered as a reflection of appellant's state of mind. The trial court then told the jury to disregard the limiting instruction previously given and that it would give them "instructions covering this point" in the final instructions. (Rep. Tr. pp. 5368-73.) The final instructions included CALJIC 54-A (rev. ed.) (contradictory statements of witness admissible only for purpose of impeachment and not as proof of truth of matter asserted). (Cl. Tr. p. 301; Rep. Tr. p. 8810.)

Even had the cross-examination of appellant as to his in-court admission been improper, appellant would be precluded from making his present claim of error by his failure to object, on the ground presently raised, to the admissibility of the statement. Evid. Code § 353; People v. Robinson, 62 Cal. 2d 889, 894. Moreover, by insisting that consideration of the statement not be limited to impeachment, appellant made applicable the rule that a party may not be heard to complain of invited error.

People v. Terry, 61 Cal. 2d 137, 150, cert. denied, 379 U.S. 866.

It is clear that defense counsel had not merely overlooked a possible ground of objection but

rather had made a deliberate, tactical decision to let the evidence in question go before the jury. What his reasons were are not important, but it is possible that he viewed appellant's courtroom outburst as so outrageous as to be indicative of irrational behavior and perhaps supportive of the defense of diminished capacity. It bears mention in this regard that defense counsel inquired of appellant during the ensuing redirect examination whether appellant could have actually entertained malice against Senator Kennedy twenty years previously, when appellant was four years of age and certainly unaware of Kennedy's existence, and appellant replied that he did not know the meaning of the term malice at that age. (Rep. Tr. p. 5339.)

Respondent submits that even if the merits of appellant's contention could be reached, appellant would not prevail on his present claim of error.

Appellant seeks to bring himself within the provisions of Evidence Code section 1153, which provides:

> "Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is

inadmissible in any action or in any proceeding of any nature . . . ."[16/]

It is clear from the foregoing recital of the circumstances attending appellant's courtroom outburst that his in-court admission was not the type of evidence whose exclusion is contemplated by section 1153. The situation involved does not evoke the concern underlying the statute, viz., that offers to plead guilty, plea negotiation, and the right to withdraw one's plea not be discouraged. Cf. People v. Quinn, supra, 61 Cal. 2d at 555(n.2); People v. Hamilton, supra, 60 Cal. 2d at 114. Appellant's outburst in mid-trial was hardly a meaningful and intelligent decision to enter a plea. Rather it reflected a momentary but nonetheless intense disagreement with the strategy of his trial counsel. It appears that neither the trial court or counsel nor appellant himself took seriously his threat to plead guilty. Rather appellant's gesture was viewed as a

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16/ A similar provision, Penal Code section 1192.4, appears to apply only to pleas specifying the degree of the offense or the punishment to be imposed. Appellant's courtroom outburst, to the extent that it related to an attempted plea, contemplated instead an unconditional plea. See also People v. Quinn, 61 Cal. 2d 551, 554-55; People v. Wilson, 60 Cal. 2d 139, 155-56; People v. Hamilton, 60 Cal. 2d 105, 113-14.

ploy (ultimately successful) to get his attorneys to retract their decision to call certain witnesses whom appellant did not wish called.

Evidence of appellant's outburst was just as admissible as other types of statements volunteered to the authorities, see People v. Tahl, 65 Cal. 2d 719, 743-44, cert. denied, 389 U.S. 942, and there is ample precedent for receiving in evidence such in-court admissions of guilt.

People v. Perry, 14 Cal. 2d 387, 394;
People v. Laursen, 264 Cal. App. 2d 932, 946-47.
See also Evid. Code §§ 1220, 1235.

Respondent submits that appellant's confession of malice aforethought was admissible, and that furthermore the action of his trial counsel precludes appellant from asserting this matter as error on appeal. Finally, even if appellant's statement were deemed an offer to plead, any error in its admission would be harmless (particularly in light of the court's final limiting instruction) as was the erroneous admission of an offer to plead guilty in People v. Wilson, supra, 60 Cal. 2d 139, 156, and People v. Hamilton, supra, 60 Cal. 2d 105, 114.

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D. The Trial Court Did Not Err in Refusing to Bar the Prosecution From Urging Death as the Proper Penalty After the District Attorney Had Expressed His Willingness to Accept a Plea of Guilty Conditioned Upon a Life Sentence

Appellant contends that the trial court erred in permitting the prosecution, in its argument to the jury at the conclusion of the penalty phase, to urge death as the proper punishment after the prosecution had expressed willingness to accept a plea of guilty conditioned upon a life sentence. (App. Op. Br. p. 341.)

At the conference held in chambers prior to commencement of the trial, at which appellant had sought to enter a plea of guilty conditioned upon a guarantee of a life sentence (see Argument I(A) herein), the prosecution--including District Attorney Evelle Younger personally--had concurred in the request for a life sentence upon a plea of guilty. (Rep. Tr. pp. 2651-52, 2657-58; see also Rep. Tr. pp. 2660, 2868-73, 2877, 2885-86.) Mr. Younger remarked,

> "[N]ow that we have gotten our psychiatrist's report, a man whom we have great confidence in, we are in a position where we can't conscientiously urge the death penalty, number one. Number two, we don't think under any

circumstances we would get the death penalty even if we urged it and number three, we don't think we can justify the trial under these circumstances." (Rep. Tr. p. 2651.)

At a subsequent conference held in chambers immediately prior to the arguments of counsel at the conclusion of the guilt phase, defense counsel requested that the trial court "instruct the District Attorney . . . not to make a request for the death penalty and that they should affirmatively recommend life." The trial court refused this request. (Rep. Tr. p. 8343.)

In support of his request, defense counsel cited the prosecution's willingness to accept a life sentence prior to the commencement of the trial, and to recommend such a sentence to the jury in the event the matter of penalty were tried subsequent to a plea of guilty to first-degree murder. (Rep. Tr. pp. 8339-40.) Defense counsel also stated that the prosecution had said if the matter of guilt went to jury trial, the prosecution "would then not affirmatively recommend life, nor . . . affirmatively ask for the death penalty, but would just leave it up to the jury." (Rep. Tr. p. 8341.)

Deputy District Attorney Howard found these

remarks to be "fairly accurate," but Chief Deputy District Attorney Lynn Compton stated that he had no recollection of the last-mentioned representation ever having been made, and the trial court correctly noted that no such representation was ever made on the record.[17/] Defense counsel maintained, however, "That's what Mr. Howard and Mr. Fitts said to me" and related that he had communicated this to appellant. (Rep. Tr. p. 8341.)

The trial court remarked, "I can conceive that the District Attorney may have had a certain opinion several weeks ago, and after hearing all the evidence he might have changed his mind." Mr. Compton added, "[T]he fact remains that one of the considerations in whether or not the defendant should be given life would be the fact that we would have avoided a lengthy trial." (Rep. Tr. pp. 8343-44.)

Upon conclusion of the guilt phase and the defense's presentation of evidence on the issue of

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17/ The only thing in the record which supports appellant's allegation, that the prosecution disclaimed any intention of urging the jury to return a death penalty in the event the issue of guilt went to trial, is the "Declaration of Grant B. Cooper in Support of Motion for New Trial" filed on the very day of the hearing of said motion. (Rep. Tr. p. 9007; Cl. Tr. pp. 495-504.)

penalty, Mr. Howard delivered the prosecution's sole argument at this phase of the proceedings. The argument was exceedingly short. (Rep. Tr. pp. 8883-88.) Although it was not an antiseptically neutral argument--and there was absolutely no reason for it to be, it was a fair and balanced consideration of the factors favoring and mitigating against a death sentence.

Mr. Howard noted that the "only question now is the proper punishment for a political assassin," referred to the "awesome discretion of each individual juror," and noted that it was "within the province of the prosecution to suggest to you some of the factors that you may determine worthy of consideration." (Rep. Tr. pp. 8883, 8885.)

Among the factors enumerated by Mr. Howard were the effect of political assassination on American society, appellant's demeanor during the trial and in particular on the witness stand, and the fairness of appellant's trial. (Rep. Tr. pp. 8883-84, 8885-86, 8888.)

On the other hand Mr. Howard called attention to appellant's having "spoke[n] knowledgeably" about the growth of the Zionist movement "and the justification in his words for the Arab dream." (Rep. Tr. pp.

8885-86.) And most significantly, Mr. Howard was generous in his characterization of the psychiatric defense advanced in appellant's behalf:

> "We have never disputed that Sirhan Sirhan is abnormal, only this extent of the abnormality, only the legal significance, if any.
>
> ". . . We cannot presume to advise you as to the extent that mental illness within the confines of full legal responsibility should influence you in the determination of a proper penalty.
>
> "We recognize that it is a significant factor for your consideration. We do not believe that it should be the only and sole determining factor. . . ." (Rep. Tr. pp. 8884-85.)

Mr. Howard concluded his argument by asking the jurors to "have the courage of your conviction" and the "courage to write an end to this trial, and to apply the only proper penalty for political assassination" in this country. (Rep. Tr. p. 8888.)

On the basis of the aforementioned portions of the record, it is respondent's position that:

1. There does not exist substantial evidence in the record to indicate that the prosecution ever committed itself to not urging death as the proper penalty in the event the issue of guilt went to trial.

2. Any expression by the prosecution prior to trial regarding the advisability of securing appellant's plea to first-degree murder in exchange for concurrence in a recommendation of life imprisonment was tentative and left the prosecution free to reconsider death as the proper penalty once (a) a lengthy and expensive trial could no longer be avoided by acceptance of the foregoing compromise, (b) the defense's psychiatric and psychological evidence, anticipated as impressive on the basis of short and tentative written reports, crumbled and evaporated as one witness after another contradicted himself and his colleagues even prior to the devastating test of cross-examination. On the other hand the conclusions of the psychiatrist who testified on behalf of the prosecution, although strongly suggestive of mental illness, ended up as an effective refutation of appellant's defense of diminished capacity. (See Rep. Tr. pp. 9031-34, and Argument II herein.)

3. Assuming the prosecution were somehow committed to not urging the jury to return a penalty

of death, this commitment was not broken by the above-described argument of Mr. Howard. Upon denying appellant's motion for new trial on this ground, the trial court observed, "I don't feel that the District Attorney affirmatively asked for the death penalty. I listened to this very carefully, the whole thing." (Rep. Tr. p. 9036.)

4. Finally, again assuming a broken commitment, the defense has failed to show that it was misled or relinquished any right or privilege by reliance on any representation made by the prosecution.

The opening statement of the defense, made prior to the calling of the prosecution's first witness, admonished the jury, "Everyone here is under great responsibility, for a life is at issue." (Rep. Tr. p. 3059.) There is nothing in the record which indicates that the prosecution, the defense, or the trial court conducted themselves other than with the possibility in mind of a potential death verdict.

To be contrasted with appellant's situation are the cases which he cites where a defendant has, by entry of a plea of guilty or waiver of jury trial, given up a substantial right. And even there such relinquishment, to constitute deprivation of a constitutional right, must have resulted from an actual

misrepresentation by the prosecuting attorney or other public officer. As this Court held in People v. Reeves, 64 Cal. 2d 766, cert. denied, 385 U.S. 952, in order to vitiate a plea there must be "apparent substantial corroboration of or connivance in such misrepresentations by a responsible public officer, relied on in good faith by the defendant, and the misrepresentations must actually operate to preclude the exercise of the defendant's free will and judgment." Id., 776-77.

Cf. United States v. Jackson, 390 U.S. 570, 581.

What this Court said with respect to the claim of the defendants in People v. Gilbert, 25 Cal. 2d 422, who had pleaded guilty to first-degree murder, is somewhat applicable to appellant:

> ". . . Of course the defendants hoped that they would escape the supreme penalty; that was the purpose of their pleas. That also, apparently, was the hope and purpose of their counsel. But hope or belief not founded on a false or fraudulent representation or promise does not constitute extrinsic fraud or denial of due process. It is apparent, as above shown, that there was no false or

fraudulent representation or promise actually made by any responsible officer of the state to the defendants either for the purpose of tricking them into waiving trial and pleading guilty, or otherwise. There is not a vestige of evidence which would support the conclusion that any person concerned in this case wilfully sought to deprive the defendants of any legal right." (Emphasis by the Court.)

People v. Gilbert, supra at 437-38.

See also People v. Nixon, 34 Cal. 2d 234, 236-37, cert. denied, sub nom. Murphey v. California, 338 U.S. 895;

In re Hough, 24 Cal. 2d 522, 527.

Cf. People v. Griggs, 17 Cal. 2d 621, 623-24.

For the foregoing reasons respondent submits that there was nothing improper in the trial court's refusal to restrict the scope of the prosecution's argument to the jury.

II

THERE WAS SUFFICIENT SUBSTANTIAL EVIDENCE TO ESTABLISH THAT APPELLANT POSSESSED THE MENTAL CAPACITY REQUISITE FOR COMMISSION OF FIRST-DEGREE MURDER

Appellant contends that this Court should modify the judgment to reduce the degree of the offense to "manslaughter or at worst second-degree murder" because

> "the evidence adduced in this case showed unequivocally that Sirhan lacked the capacity to maturely and meaningfully premeditate, deliberate and reflect upon the gravity of his contemplated act or form an intent to kill due to his paranoid schizophrenic personality, the alcohol he imbibed and the dissociated state in which he found himself at the time of the killing; . . . moreover, he was unable to comprehend his duty to govern his actions in accord with the duty imposed by law and thus did not act with malice aforethought. . . ." (App. Op. Br. p. 357.)

This Court has declared, with reference to

the proof required to sustain a conviction against the contention of diminished mental capacity, that the "true test must include consideration of the somewhat limited extent to which this defendant could maturely and meaningfully reflect upon the gravity of his contemplated act." (Emphasis by the Court.)

People v. Wolff, 61 Cal. 2d 795, 821.

In contending that he lacked the capacity to assassinate Senator Robert Kennedy, appellant relies principally on the cases of People v. Wolff, supra, 61 Cal. 2d 795; People v. Goedecke, 65 Cal. 2d 850; People v. Nicolaus, 65 Cal. 2d 866; and People v. Bassett, 69 Cal. 2d 122. (App. Op. Br. pp. 359-70, 388, 405-06.)

Analysis of these cases, and application of the principles set forth therein to the evidence at hand, establishes that appellant's claim of diminished capacity is without merit.

In Wolff, supra, this Court reduced the conviction of first-degree murder to second-degree murder. The defendant, a fifteen-year-old boy at the time of the offense, had killed his mother by beating her with an ax handle and choking her. According to the unanimous opinion of four psychiatrists, the

defendant was permanently and schizophrenically insane to such an extent that, although he had ample time for any normal person to reflect maturely and appreciatively on his contemplated act and to arrive at a cold, deliberated, and premeditated conclusion, "the extent of his understanding, reflection upon it and its consequences" was materially "vague and detached" with reference to "the quantum of his moral turpitude and depravity." Id. , 821-22.

In People v. Goedecke, supra, 65 Cal. 2d 850, the defendant while sane killed his father, for which the defendant was convicted of first-degree murder, and killed his mother, brother, and sister for which the jury found him guilty of second-degree murder but insane. The victims came to their death by being beaten and stabbed. Although there was a conflict in the psychiatric testimony regarding the defendant's ability to form an intent to kill and to premeditate the killing, there was no psychiatric testimony as to the extent to which the defendant could maturely and meaningfully reflect upon the gravity of his contemplated act. Relying upon the "bizarre nature of the crime" and the fact that his "actions during the commission of the killings and

afterwards were completely foreign to his character and to his relationship with his family," the Court concluded that the defendant's understanding and reflection upon the intended act and its consequences "fell short of the minimum essential elements of first degree murder, especially in respect to the quantum of reflection, comprehension and turpitude of the offender." Id., 857-58.

People v. Nicolaus, 65 Cal. 2d 866, involved a defendant who had killed his three children by shooting them each in the head after buying them toys to make them happy, taking them for a ride, and having them climb into the trunk of his car. The various psychiatrists expressed conflicting opinions on the issue of the defendant's capacity to premeditate the killings, but neither of the psychiatrists who testified for the prosecution "expressed an opinion as to the extent of the defendant's ability to maturely and meaningfully reflect upon the gravity of his contemplated act" and one of them apparently failed to take into account the defendant's previous history of bizarre and abnormal conduct. Because of the "character of the killing" and the "quantum of personal turpitude of the actor," this Court

concluded that the evidence was insufficient to sustain the finding that the murders were of the first degree. Id., 873, 878.

The Bassett case involved the first-degree murder conviction of a "youth suffering since childhood from deep-seated paranoid schizophrenia, who at the age of 18 methodically executed his mother and father." People v. Bassett, supra, 69 Cal. 2d 122, 124. This Court defined its duty, in evaluating the evidence of the defendant's mental capacity, as

> ". . . twofold. First, we must resolve the issue in the light of the whole record --i.e., the entire picture of the defendant put before the jury--and may not limit our appraisal to isolated bits of evidence . . . . Second, we must judge whether the evidence of each of the essential elements constituting the higher degree of the crime is substantial; it is not enough . . . simply to point to 'some' evidence supporting the finding . . . ." (Emphasis by the Court.) Id., 138.

In concluding that the prosecution's psychiatric testimony introduced on rebuttal was not substantial, the

Court stressed that neither of two prosecution psychiatrists had examined the defendant in person and both testified merely on the basis of a lengthy hypothetical question posed by the prosecuting attorney. Although both psychiatrists had phrased their conclusions in terms of the defendant's ability to reflect maturely and meaningfully upon the gravity of the contemplated act, their conclusions were found to lack probative force in light of the material and reasoning by which the opinions were arrived at. Id., 141-46. The Court found the testimony of a third psychiatrist called by the prosecution so "self-contradictory" that it could not be substantial. The Court concluded, "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." Id., 148.

From the foregoing cases the following principles may be culled: this Court will not adhere to its usual deference to the findings of the trier of fact (1) where the finding of requisite mental capacity is contradicted by unanimous psychiatric testimony and by the other evidence in the case,

or (2) where although the psychiatric testimony is in conflict, none of it is addressed to the ultimate question of capacity for mature and meaningful reflection, and the conduct of the defendant during and subsequent to the commission of the offense was bizarre and uncharacteristic of his usual behavior, or (3) where there is no real conflict in the psychiatric testimony because the conclusions of the psychiatrists supporting the finding of requisite mental capacity do not constitute substantial evidence in light of the psychiatrists' failure to take into account significant material, their significant inclusion of extraneous matter, or their employment of self-contradictory or faulty reasoning processes.

Respondent submits that appellant has failed to bring his case within the holdings of the aforementioned cases and that his conviction of first-degree murder passes muster under the principles established therein.

The defense's psychiatric and psychological evidence, previously set forth at length (at pp. 66-107, infra), will not be repeated here except by way of an outline of the expert testimony bearing on the specific issue of appellant's capacity for mature

and meaningful reflection upon the gravity of the contemplated assassination.

The clinical evidence which the defense presented relative to appellant's mental capacity in effect consists of the testimony of two psychologists, Schorr and Richardson, and two psychiatrists, Dr. Marcus and Dr. Diamond. The other four psychologists called by the defense (Seward, De Vos, Howard, and Crain) merely attempted to interpret and verify the findings of Schorr and Richardson and never observed or tested appellant. Their testimony is thus entitled to negligible weight.

People v. Bassett, supra, 69 Cal. 2d 122, 140-43.

Martin Schorr, a clinical psychologist, examined appellant at the county jail for several hours on November 25, 1968, and for most of the following day, administering several psychological tests including the Wechsler Adult Intelligence Scale, the Minnesota Multiphasic Personality Inventory (MMPI), the Thematic Apperception Test (TAT), the Bender Visual Motor Gestalt, and the Rorschach. (Rep. Tr. pp. 5540, 5547.) Mr. Schorr testified at length regarding his opinion, derived from the test results, of appellant's general mental and emotional makeup. But it was only

at the conclusion of the direct examination that he was asked whether "any such person as you have described, meaning Sirhan, [could] . . . have the mental capacity to maturely and meaningfully premeditate, deliberate and reflect upon the gravity of his contemplated act of a murder on June 5, 1968." (Rep. Tr. p. 5735.) Without revealing the basis or the reasoning process which led him to so conclude, Mr. Schorr testified simply, "As you state the question, I do not feel that this man can meaningfully and maturely premeditate." (Rep. Tr. p. 5736.) Schorr was then asked,

> "[U]sing the same assumptions that I put in the question before, could any such individual described by you as you have described him have the mental capacity to comprehend his duty to govern his actions in accord with the duty imposed by law, and thus have the mental capacity to act with malice? Malice aforethought?"

His reply was "The answer is again no." (Rep. Tr. p. 5738.)

However, the foregoing opinion was contradicted by Mr. Schorr himself, on cross-examination. Asked whether one of his written reports had not

stated "that a portion of the time Mr. Sirhan does have the ability to premeditate," Schorr testified, "I never said he couldn't premeditate," and "Yes, he can premeditate," "has the ability" and "also has the ability to harbor or have malice." Asked whether appellant also had the "ability to have a mature reflection upon conduct," Schorr replied, "No, not mature," defining "'mature' in a legal sense" as

> ". . . [w]here he by maturely reflecting upon what his acts are, I mean, or as I understand the legal term that he handles a situation in a responsible adult manner with full awareness of the situation and a full awareness of his relationship, in other words, he is completely responsible and responsive." (Rep. Tr. pp. 6330-31.)

Clearly, Mr. Schorr's testimony was not "'substantial' evidence, i.e., evidence that reasonably inspires confidence and is 'of solid value.'" People v. Bassett, supra, 69 Cal. 2d at 139. Schorr "correctly recite[d] by rote a certain ritual formula," but this does not "call a halt to our inquiry" in determing "the substantiality of the

proof which that testimony purported to represent." Id., 140-41. Schorr's testimony falls far short of the mark of substantiality when judged by "'the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion.'" Id., 141. If indeed "'the opinion of an expert is no better than the reasons upon which it is based,'" id., 144, the value of Schorr's opinion is zero, for he advanced no reasons for his opinion on appellant's ability to premeditate. Likewise Schorr's opinion is impugned by the inaccuracy and improper technique in his testing (see the testimony of Mr. Ollinger, infra at 107-12.) The absurdity of some of Schorr's methods (e.g., scoring a dove as a symbol of violence on the Rorschach (Rep. Tr. pp. 6455-56)) is apparent even to the untrained layman. Equally ridiculous is Schorr's explanation of appellant's motive in assassinating Senator Kennedy: the killing of a father-substitute in order to regain "his most precious possession, his mother's love." (Rep. Tr. pp. 5850-51.) The same is true of Schorr's acceptance, "as a matter of truth," of facts supplied by appellant, and the basing of Schorr's opinion in part on what Schorr had

learned from the newspapers, Life Magazine, and television. (Rep. Tr. pp. 5848, 6180.) Schorr's opinion is also discredited by his having formed a bias as to appellant's condition ("[t]here can be no real basis for premeditation") even before having examined appellant for the first time (Rep. Tr. pp. 5928, 6175-76, 6185), and by his having plagiarized large portions of his final report from a sensationalistic book. (Rep. Tr. pp. 6188-89, 6196, 6254-56, 6259-62, 6265-68, 6271-74, 6282-83, 6292-95.)

Orville Richardson, the other psychologist who examined appellant, did so only between 11:00 a.m. and 2:00 p.m. of one day, administering a battery of tests similar to Schorr's. (Rep. Tr. pp. 6337, 6477.) Richardson described his approach to the Rorschach as "somewhat different than" Schorr's (Rep. Tr. pp. 6354, 6415, 6423) and admitted that the Rorschach responses which he himself received were incomplete because "I was excited and jumpy and wasn't functioning properly." (Rep. Tr. p. 6422.) The results obtained by Richardson on the Bender test were also different from Schorr's. (Rep. Tr. pp. 6379, 6383.) Some of the differences might be clinically significant in Richardson's view. (Rep. Tr. pp. 6474-76.)

He could not understand some of Schorr's scoring and reasoning. (Rep. Tr. pp. 6453-56, 6460, 6466.) He also found scoring errors in his own testing of appellant. (Rep. Tr. pp. 6446-48.) Richardson admitted that prior to examining appellant he began with an "assumption" that appellant was paranoid. (Rep. Tr. p. 6444.) He found significant appellant's test response admitting to "strange and peculiar thoughts," yet Richardson himself admitted to having such thoughts. (Rep. Tr. pp. 6558-59.)

As in the case of Mr. Schorr, the direct examination of Mr. Richardson left to the last two questions the inquiry whether appellant had "the mental capacity to maturely and meaningfully deliberate and reflect upon the gravity of his contemplated act" and to "comprehend his duty to govern his actions in accord with the duty imposed by law, and thus have the mental capacity to act with malice aforethought." Although his prior testimony was not directly related to either of these issues, Richardson mechanically uttered what the defense apparently considered to be the "magic in the particular words emphasized in Goedecke and Nicolaus," People v. Bassett, supra, 69 Cal. 2d at 140, casting

no light on the basis for his conclusion or the purported reasoning by which he arrived where he did. (Rep. Tr. pp. 6437-39.) As with regard to Mr. Schorr, respondent submits that this testimony did not constitute "substantial" evidence, "of solid value," indicative of diminished mental capacity on appellant's part. Id., 138-39.

As previously detailed, the two psychiatrists called by the defense took into account a wide variety of materials in arriving at their overall evaluations of appellant and spent a considerable amount of time in personal interviews with him.

Dr. Marcus was asked the same two indicated questions and responded that appellant lacked the requisite mental capacity. (Rep. Tr. p. 6666.) Asked to explain his reasoning, Dr. Marcus said only

> "Based on . . . his notebooks dating back at least May, probably earlier, and also other books that quite a bit predate that, in my opinion he was, as I said earlier, he was mentally disturbed and became increasingly more disturbed during the Spring of last year. That is also noted in the psychological tests and I feel that his

mental disturbance was relevant and directly related to his political views and his feelings about Robert Kennedy; I feel therefore that he could not meaningfully and maturely think and deliberate on his actions." (Rep. Tr. p. 6667.)

In response to further questions, Dr. Marcus added that in his

". . . opinion Sirhan thought that he was really more or less the saviour of society. He was going to reorganize or at least destroy the current political leaders of the country. In addition to that, . . . he decided what he thought was best for society and too based on that I don't feel he really was competent or capable of having malice within that technical sense." (Rep. Tr. p. 6668.)

Dr. Marcus admitted that the entry in appellant's notebook, indicating appellant's desire to kill his former employer, was inconsistent with Marcus' hypothesis. (Rep. Tr. pp. 6669-70.) Other inconsistencies in Marcus' testimony further impugned his conclusions. Marcus did not know whether appellant

had real amnesia or was malingering, thought it was a "toss-up," yet believed appellant's claim of amnesia even though it was "quite possible" that appellant was lying to him. (Rep. Tr. pp. 6784, 6788-90.) Marcus felt that appellant's "not looking for a job" was evidence of deterioration, yet going to work at the health food store "may or may not have anything to do with any sort of mental deterioration." Likewise, "reading in libraries subjects that interested him is evidence of deterioration." (Rep. Tr. pp. 6693-94.)

Almost laughable is the psychiatric significance which he drew from appellant's erratic behavior after having been administered alcohol by Dr. Marcus. (Rep. Tr. pp. 6811-13.) As Dr. Pollack observed, disagreeing very strongly with Marcus' conclusion that appellant's behavior during the alcohol test was definitely psychotic, appellant's actions were typical of the usual intoxicated person and were understandable in light of Marcus' having given appellant (a person of slight build) six ounces of gin within five minutes. (Rep. Tr. pp. 7690-91.)

In light of the previously cited authority, Dr. Marcus' opinion does not merit great weight, and

his testimony is hardly so persuasive as to compel the trier of fact to reject the non-clinical evidence of appellant's capacity for premeditation and deliberation. Dr. Marcus did not give the jury any insight into the reasoning process which hopefully he employed in arriving at his conclusions, although the contradictions and deficiencies in Dr. Marcus' methodology must have given the jurors an insight into the worth of his opinion.

If there indeed is "unequivocal" evidence of diminished capacity (App. Op. Br. p. 357), it must come from the testimony of the remaining defense psychiatrist, Dr. Diamond. Diamond's talismans of diminished capacity were self-hypnosis, bright lights, and mirrors. (Rep. Tr. pp. 6879-80, 6937-41, 6996-97.) His conclusion was again that appellant could not "maturely and meaningfully reflect upon the gravity of his contemplated act" or "comprehend his duties to govern his actions in accordance with the duties imposed by law." (Rep. Tr. p. 6881.) The "various sources" which Diamond used as the basis for his opinion were personal examinations of appellant (some under hypnosis), interviews with appellant's mother and brother, the reports of the defense

psychologists, the report of Dr. Marcus, certain medical reports which proved normal, transcripts of police interviews with appellant and of appellant's testimony, literature read by appellant, and Diamond's personal inspection of the Sirhan residence and the scene of the assassination. (Rep. Tr. pp. 6881-83.) When asked for the reasoning behind his opinion, Dr. Diamond gave a lengthy discourse on the elements of paranoid schizophrenia and on the indications of this mental disease which he found in appellant's background. (Rep. Tr. pp. 6883-6913.)

However, Dr. Diamond's lecture cast little if any light on why appellant's mental illness would preclude his being able to reflect maturely and meaningfully upon the gravity of assassinating a Presidential candidate or comprehend his duty not to commit such an act.

As has already been noted, "'. . . the opinion of an expert is no better than the reasons upon which it is based,'" and the "chief value of such an expert's testimony . . . lies 'in the explanation of the disease and its dynamics, that is, how it occurred, developed, and affected the mental and emotional processes of the defendant.'"

People v. Bassett, supra, 69 Cal. 2d 122, 144 (emphasis added).

Furthermore, whatever value there was in Dr. Diamond's conclusions is impaired by his deliberate refusal to consider, as pertinent, various factors which indisputably were entitled to some weight in the formulation of an opinion on the issue of appellant's mental capacity. For example, while presumptuously maintaining that "nobody else really had the proper whole story of Sirhan" until he examined him six months after the assassination (Rep. Tr. p. 7094), Dr. Diamond did not know until after the trial had commenced that appellant had told the garbage collector two months prior to the assassination that appellant was going to "kill that s. o. b." Senator Kennedy. (Rep. Tr. p. 7099.) Even more presumptuously, Dr. Diamond opined that the witness Alvin Clark, the garbage collector, was "incorrect" in his testimony, although Diamond did not "know anything about the witness except for the statement." Recognizing "that Sirhan was consciously selecting certain material to give to [Dr. Diamond] and consciously withholding other material, because he didn't trust [him]," Dr. Diamond testified, "I prefer to believe

Sirhan." (Rep. Tr. pp. 7099-7100.) Although Dr. Diamond admitted that appellant had lied to other persons and had given Diamond himself "the grossest kind of evasion and deception" with respect to some matters, Dr. Diamond thought he had a "fairly good idea" of when appellant is lying and what things he lies about. (Rep. Tr. pp. 7045, 7048, 7056, 7098.) Dr. Diamond believed appellant's statement that, when he went to the Ambassador Hotel two days prior to the assassination, he "loved" Senator Kennedy. (Rep. Tr. p. 7132.)

Dr. Diamond did not view appellant's visit to the shooting range on the day of the assassination as "indicative of some kind of premeditation and deliberation"; appellant was merely exercising one of his "chief emotional outlets." (Rep. Tr. pp. 7109, 7112.) In Dr. Diamond's view, appellant did not "consciously plan" to be in the "physical situation" in which the assassination occurred; it was just "chance, circumstances, and a succession of unrelated events." (Rep. Tr. p. 6996.)

Dr. Diamond's bias is rather evident, particularly in his admission that he had tried his "very best to get . . . through" to appellant "that

the legal strategy of the defense is that there was no premeditation or deliberation." (Rep. Tr. p. 7108.) Perhaps the most fitting epitaph to his testimony was formulated by Diamond himself, when he testified with respect to his own "psychiatric findings" in this case: "They are absurd, preposterous, unlikely and incredible." (Rep. Tr. pp. 6998-99.)

Respondent concurs in Dr. Diamond's evaluation of his own conclusions and submits that his testimony did not constitute substantial evidence of diminished capacity on appellant's part.

The only sense in which the psychiatric and psychological evidence presented by the defense was "unequivocal" (App. Op. Br. p. 357) was in the uniform lack of substantial proof of appellant's mental incapacity in the testimony of any of the indicated witnesses. The testimony of each of the defense psychiatrists and psychologists was characterized by self-contradiction, improper exclusion, inclusion, or evaluation of material, and faulty reasoning in addition to being inconsistent in significant respects among the various defense clinicians.[18/]

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18/ As Chief Deputy District Attorney Compton pointed out to the jury in his closing argument, defense

Although the foregoing is a sufficient refutation of appellant's claim of substantial evidence of diminished mental capacity, respondent wishes to note the existence of affirmative evidence of appellant's capacity for premeditation and deliberation. In his testimony on rebuttal (set forth at length at 112-28, infra) Dr. Pollack clearly expressed his opinion that appellant possessed the requisite mental capacity. Most significantly he, among all the psychiatrists and psychologists, was the only one to set forth a substantial basis for his conclusions, as indicated below.

It was Dr. Pollack's opinion that appellant

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counsel too rejected a major portion of the clinical evidence introduced by the defense:

> "Mr. Cooper told you . . . that that is one of the necessary ingredients in the crime of second degree murder -- malice -- and all of the seven have told you that he had no malice; yet Mr. Cooper stands here in front of you and says, 'Find him guilty of second degree murder.'
>
> "So apparently he has rejected the psychiatrists and the psychologists, just as we reject them." (Rep. Tr. p. 8712.)

In view of the dubious nature of the clinical evidence in the present case, it would be, as Mr. Compton characterized it, "a frightening thing for the administration of criminal justice in this State if the decision of the magnitude of this case turned on whether or not [appellant] saw clowns playing pattycake or whether they were kicking each other in the shins when he is shown some ink blot." (Rep. Tr. p. 8765; cf. Rep. Tr. p. 6459.)

had capacity to harbor the requisite intent to select an act and carry it out, and that therefore his action in shooting Senator Kennedy was purposeful and not accidental. The assassination was not an "impulsive explosion"; there was no substantial impairment of appellant's freedom of choice. Appellant's mental capacity was not substantially decreased when he shot the Senator. Appellant had capacity to harbor malice aforethought, to form maturely and meaningfully an intent to kill his victim, to premeditate, and to reflect upon the gravity of the contemplated act. (Rep. Tr. pp. 7619, 7621-23, 7665-67, 7671-72.)

In arriving at this conclusion Dr. Pollack took into account the following psychological functions of appellant:

> ". . . Consciousness, state of awareness, alertness, the capacity for attention, the ability to perceive, to develop percepts, to make meaningful associations out of what the individual senses, the person's ability to have foresight, the ability to look forward . . . , abilities to recall, as well; the ability to understand . . . and . . . .

". . . evaluation of the freedom of choice."
(Rep. Tr. pp. 7643-44.)

Among the reasons for Dr. Pollack's conclusion that appellant did not suffer from diminished mental capacity or psychotic mental illness were appellant's lack of any impairment in consciousness, reasoning, alertness, memory, or associations prior to the date of the assassination, the fact that appellant asked and answered certain questions both immediately prior to and subsequent to the assassination, the adequate planning undertaken by appellant, the testimony of witnesses to the effect that appellant's emotions did not appear very disturbed at the time of the assassination, the particular motives which impelled appellant's act, and Dr. Pollack's opinion that appellant's writings were not indicative of psychosis. (Rep. Tr. pp. 7668, 7670-71, 7681-87.)

Respondent submits that three cases decided by this Court subsequent to Bassett, but not cited by appellant on the issue of diminished mental capacity, further refute his contention that the evidence relating to appellant's mental capacity compels reduction of the offense to second-degree murder or manslaughter.

In re Kemp, 1 Cal. 3d 190, 194-96;

People v. Coogler, 71 Cal. 2d 153, 161-68;

People v. Risenhoover, 70 Cal. 2d 39, 46-49, 51-53, cert. denied, 396 U.S. 857.

Significantly the Court reached the conclusion in Coogler that the evidence of first-degree murder was sufficient despite the fact "that the prosecution produced no expert witnesses of its own to contradict the defense testimony that defendant suffered from a disassociation reaction." Id., 166.

Like the crime in Coogler, the present offense, involving as it does an act of assassination designed to further appellant's political goals, "'was not a bizarre crime whose very character pointed to dissolution of the accused's deliberative faculties.'" Id., 167. Compare the parricide, matricide, and infanticide of Wolff, Goedecke, Nicolaus, and Bassett. Contrasting People v. Ford, 65 Cal. 2d 41, cert. denied, 385 U.S. 1018, the Court in Coogler further noted the lack of evidence suggesting that the "defendant behaved in an abnormal or irrational manner during the actual commission of the crimes," and the same is true here.

People v. Coogler, supra at 167.

All the non-clinical evidence in the present case lends further support to the conclusion that

appellant had the capacity to harbor malice aforethought and to deliberate and reflect maturely and meaningfully upon the gravity of the political assassination which he contemplated: his purchase of the murder weapon almost six months prior to the assassination, his statements of intention to the garbage collector and in his notebooks, his political motivation, his stalking of Senator Kennedy--closely following his whereabouts in Oregon and Washington, his trips to the shooting range and visit to the Ambassador Hotel two days prior to the assassination, and his conduct (and non-intoxicated condition) immediately prior to, during, and subsequent to the assassination itself.[19/]

It also bears mention that appellant concedes that the jury "was instructed correctly under the Conley decision (C.T. 283-91)." (App. Op. Br. p. 409.) Significantly the instructions on mental

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19/ Contrary to appellant (App. Op. Br. p. 389), respondent does not find supportive of the claim of diminished capacity appellant's "game playing" while the police attempted to interrogate him, his kicking a cup of coffee out of the hands of one officer, and his caution in drinking any beverage offered him by the police. Appellant's ability to identify an absent officer by the officer's badge number, 3949, and his play on words with Sergeant Jordan's name at a time when Jordan was attempting to ascertain appellant's name and place of origin, are instead indicative of a highly rational and sober individual. (Rep. Tr. pp. 5951, 6104, 6108-09.)

capacity were not only correct statements of the law but were given, with only a couple of minor exceptions, at the request of the defense. People v. Nye, 63 Cal. 2d 166, 173. They allowed the jury to consider as possibilities first-degree murder, second-degree murder, manslaughter, and total acquital by reason of unconsciousness. (Cl. Tr. pp. 275-93; Rep. Tr. pp. 8795-8805.) Appellant had the defense of diminished capacity, arising from mental disease, intoxication, or any other cause such as organic defect, presented to the jury in numerous instructions, and the jury had ample evidence upon which to reject such a defense. Thus totally inapposite are the cases cited by appellant in which reversible error is premised upon a defense having been improperly withheld from the jury's consideration by the trial court's giving, or failing to give, a particular instruction. (App. Op. Br. pp. 406-10.)

Cf. People v. Castillo, 70 Cal. 2d 264, 270;
People v. Conley, 64 Cal. 2d 310, 319-20;
People v. Henderson, 60 Cal. 2d 482, 490-91.
See also People v. Goodridge, 70 Cal. 2d 824, 837;
People v. Fain, 70 Cal. 2d 588, 599-600.

Respondent submits that there was clearly sufficient substantial evidence to establish appellant's capacity to commit murder with malice aforethought, and in particular to establish appellant's capacity to premeditate and deliberate first-degree murder maturely and meaningfully with reflection upon the consequences of the assassination which appellant had contemplated for months.

III

THE SEARCH OF APPELLANT'S BEDROOM AND THE SEIZURE OF TRASH FROM THE AREA BEHIND THE SIRHAN RESIDENCE WERE LAWFUL

Appellant contends that the guarantee against unreasonable searches and seizures contained in the Fourth and Fourteenth Amendments to the federal Constitution, and article I, section 19 of the California Constitution was violated (1) by the search of his bedroom, which recovered the notebooks, portions of which were received in evidence over his objection (Rep. Tr. pp. 4356-58), and (2) by the seizure of the envelope bearing appellant's handwriting and the return address of the Argonaut Insurance Company, which envelope was also received in evidence over his objection (Rep. Tr. pp. 4354-56,

4359, 4397-4401). (App. Op. Br. pp. 426, 457.) The contents of the notebooks are in part set forth at pages 26-28, 50-54, infra, and the handwriting from the envelope at pages 25-26, infra.

A. Appellant Is Precluded From Challenging the Propriety of the Trial Court's Rulings, Admitting in Evidence the Notebooks and the Envelope Recovered From the Trash, by the Fact That All but Five Sheets of the Notebooks Were Put in Evidence by the Defense and the Entire Notebooks as Well as the Envelope Were Used by the Defense as Proof of Diminished Mental Capacity

Prior to reaching the merits of appellant's present claim of error, respondent disputes the right of appellant to urge as error the admission in evidence of the notebooks and the envelope recovered from the trash area, as the products of allegedly unlawful searches and seizures.

Only five sheets of the notebooks (Exhs. 71-15, 71-35, 71-39, 71-47, & 72-125) were put in evidence by the prosecution (Rep. Tr. p. 4363); the remaining pages, comprising the vast majority of the notebooks, were put in evidence by the defense. (Rep. Tr. pp. 4955, 5095, 5191.) Significantly some of these pages offered by the defense were substantially more damaging than those portions offered by the

prosecution, from the standpoint of showing appellant's praise of communism and hatred toward this country, stated in occasionally profane terms, and appellant's expression of willingness to resort to political assassination. (Rep. Tr. pp. 4987-91, 4994-95, 5009-11, 5018; Exhs. 71-19 through 25, 71-34, 71-39.) One of the pages offered by the defense, containing the following language, had been kept out of evidence on objection of the defense when the prosecution had sought to have it admitted (Rep. Tr. pp. 3608-10, 4365-69):

> "I advocate the overthrow of the current president of the fucken United States of America. I have no absolute plans yet, but soon will compose some. . . . I firmly support the communist cause and its people -- wether [sic] Russian, Chineese [sic], Albanian, Hungarian or whoever--Workers of the world unite, you have nothing to loose [sic] but your chains, and a world to win." (Exh. 72-123 & 124 (emphasis in original); Rep. Tr. pp. 5095-96.)

This is not a situation where appellant could

properly claim that the conduct of the search, or the prosecution's introduction in evidence of five sheets of the seized notebooks, somehow compelled him to offer the remaining, even more damaging, portions of the notebooks.

See People v. Quicke, 71 Cal. 2d 502, 518; Symons v. Klinger, 372 F.2d 47, 49 (9th Cir. 1967), cert. denied, 386 U.S. 1040.[20/]

It is well settled that on appeal objection may not be made by a defendant to the admission of evidence introduced by the defendant, People v. Feldkamp, 51 Cal. 2d 237, 241, or admitted pursuant to his stipulation.

People v. Foster, 67 Cal. 2d 604, 606.

The defense's decision to offer in evidence the remaining portions of the notebooks, if compelled by anything, was compelled by the defense's own decision to offer evidence of diminished mental capacity. Thus the defense psychiatrists examined the entire contents of the notebooks prior to trial and based

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20/ See also Lockridge v. Superior Court, 3 Cal. 3d 166, 170, cert. denied, ___ U.S. ___, 39 U.S.L.W. 3455; People v. Tiffith, 12 Cal. App. 3d 1129, 1136; People v. Wright, 273 Cal. App. 2d 325, 338-40; People v. Green, 236 Cal. App. 2d 1, 25-26, cert. denied, 390 U.S. 971.

their testimony, regarding appellant's asserted lack of ability to premeditate, on what they took to be appellant's mental condition as reflected by the notebook entries and the writing on the envelope recovered from the trash area. It cannot be doubted that even had the prosecution not put in evidence the five notebook sheets and the envelope, defense counsel would have offered in evidence the entire notebooks and the envelope, and argued strenuously to the jury, as they ultimately did, that this evidence established appellant's lack of the requisite mental capacity.

See People v. Davaney, 7 Cal. App. 3d 736, 745-47 (the defendant's testimony, which rendered harmless the improper admission of a confession, was held not to have been impelled by the confession but rather by the defendant's desire to establish his defense of diminished mental capacity.)

Respondent submits that for the foregoing reasons appellant is precluded from challenging the propriety of the trial court's ruling admitting in evidence the notebooks and the envelope.

B. The Search of Appellant's Bedroom and the Seizure of His Notebooks, Without a Search Warrant, Was Proper in Light of the Pressing Emergency to Ascertain the Existence of a Possible Conspiracy, Appellant's Concealment of His Identity and Refusal to Discuss the Shooting Giving Rise to a Reasonable Apprehension of the Imminent Assassination of Other High Government Officials

The circumstances underlying the authorities' decision to search the Sirhan residence are fully set forth at pages 20-22, 29-35, infra, and only those facts having an immediate bearing on the applicability of the "emergency circumstances" doctrine will be repeated here.

When the decision to search was made on the morning of June 5, 1968 (subsequent to the shooting but prior to the death of Senator Kennedy), appellant had not yet identified himself to the police or given them his address or any identifying information. (Rep. Tr. pp. 115-16.) He carried no identification papers on his person at the time of his arrest. (Rep. Tr. pp. 3522-23.) Appellant's identity remained unknown from the time he was taken into custody at approximately 12:15 a.m. until officers of the Los Angeles Police Department arrived at the Pasadena Police Station at approximately 9:30 that morning "to interview a person [who]

possibly could name the identity of the person who shot Senator Kennedy." At that time they had a conversation with Adel Sirhan. (Rep. Tr. pp. 54-56, 59, 90-91, 94-95.) Adel had gone to the police station shortly after he and his brother Munir had seen appellant's picture in the newspaper in conjunction with the shooting of Senator Kennedy. (Rep. Tr. pp. 103-04.) Adel, like appellant, must have appeared to be a foreigner, and Adel stated that his father was in a foreign country. (Rep. Tr. p. 92.) Adel communicated to the police his belief that appellant was involved in the shooting of Senator Kennedy and told them that appellant resided at the Sirhan residence located at 696 East Howard in Pasadena. (Rep. Tr. p. 60.)

Without obtaining a search warrant, the officers proceeded to the Sirhan residence, arriving there at approximately 10:30 a.m. Their purpose in going there was "[t]o determine whether or not there was anyone else involved" in the shooting and also "to determine whether or not there were any other things that would be relative to the crime." (Rep. Tr. pp. 4273-75.) They "were looking for leads or other possible suspects" and "were interested

in evidence of possible conspiracy in that there might be other people that were not yet in custody." (Rep. Tr. pp. 75-77, 4313.)

It has long been recognized that "[t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." Johnson v. United States, 333 U.S. 10, 14-15. In McDonald v. United States, 335 U.S. 451, 454-56, the United States Supreme Court recognized that "compelling reasons," a "grave emergency," or "the exigencies of the situation" may justify the search of a residence without a warrant. Relying on the foregoing language in McDonald, the court in Warden v. Hayden, 387 U.S. 294, 298-300, sustained the search of an entire two-story house and cellar by officers who were in pursuit of a suspected armed felon who had entered the house several minutes before they arrived.

See also Vale v. Louisiana, 399 U.S. 30, 34-35; Chimel v. California, 395 U.S. 752, 761; United States v. Jeffers, 342 U.S. 48, 51-52.

Chief Justice Burger, when sitting on the

United States Court of Appeals, stated the principle succinctly:

> "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. . . ." Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963), cert. denied, 375 U.S. 860.

This Court relied on the McDonald case in sustaining the search in People v. Gilbert, 63 Cal. 2d 690, vacated on other grounds, 388 U.S. 263, stating that a "search without a warrant is reasonable when it is . . . justified by a pressing emergency." Id., 706. There the "officers identified Gilbert and found out where he lived less than two hours after the robbery." Id. Entering without a warrant "in fresh pursuit to search for a suspect and make an arrest," the officers found the apartment unoccupied but noticed, among other items, a notebook on a coffee table with a drawing of the bank that had been robbed as well as an envelope from a photography studio containing a photograph of the defendant Gilbert. The photograph was

later shown to bank employees for identification. Id., 706-07.

This Court held that the "exigent circumstances" justified the search and seizure, and that "[w]hile the officers were looking through the apartment for their suspect they could properly examine suspicious objects in plain sight. [Citation.] Moreover, they could properly look through the apartment for anything that could be used to identify the suspects or to expedite the pursuit."[21/]

People v. Gilbert, supra at 707.

Similarly in People v. Smith, 63 Cal. 2d 779, cert. denied, 388 U.S. 913, this Court upheld the officers' search of a residence in pursuit of a dangerous suspect, "for the suspect or for any evidence of the suspect's having been there and gone." The Court held that having ascertained that the suspect was absent, the police were not "required at that point to abandon their search for [him] or his true identity. . . . While in the house, it was

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21/ The United States Supreme Court found that "the facts do not appear with sufficient clarity to enable us to decide" the applicability of the "so-called 'hot pursuit' and 'exigent circumstances' exceptions" to the warrant requirement. Gilbert v. California, 388 U.S. 263, 269.

not unreasonable for the officers to look about them for evidence that would identify the suspect . . . or that would enable them to pick up his trail." Id., 797-98.

See also People v. Terry, 70 Cal. 2d 410, 424, cert. denied, 399 U.S. 911;

Tompkins v. Superior Court, 59 Cal. 2d 65, 69.

Analogous are the cases in which the emergency circumstances doctrine is invoked to justify a search or entry motivated by a police officer's exercise of his duty to protect life or render emergency aid to a victim.

See People v. Roberts, 47 Cal. 2d 374, 377-80 (entry of officers in response to moaning sounds);

People v. Superior Court, 6 Cal. App. 3d 379, 381-83 (pursuit of injured bomber who was believed to possess another, unexploded bomb);

People v. Neth, 5 Cal. App. 3d 883, 887-88 (officers summoned to aid person in need of immediate medical attention because of overdose of LSD);

People v. Robinson, 269 Cal. App. 2d 789, 791-92 (search of premises from which shots

had been fired, injuring an infant);

Romero v. Superior Court, 266 Cal. App. 2d 714, 718-19 (search for further explosives at scene of explosion "for the protection of the inhabitants . . . and also the nearby property owners");

People v. Clark, 262 Cal. App. 2d 471, 475-77 (probability that a woman within the searched apartment was the unwilling victim of a criminal act);

People v. Roman, 256 Cal. App. 2d 656, 659 (entry of officer in child-beating investigation upon observing victim unconscious on floor);

People v. Bauer, 241 Cal. App. 2d 632, 646-47 (necessity to attempt to render medical assistance to victim who might still be alive);

People v. Gomez, 229 Cal. App. 2d 781, 782-83 (search of pockets of unconscious, convulsive motorist in attempt to identify him for purpose of obtaining medical assistance);

People v. Gonzales, 182 Cal. App. 2d 276, 279

(similar search of wounded motorist in state of shock).

See also Schmerber v. California, 384 U.S. 757, 770-71 (taking a blood sample from intoxicated motorist);

People v. Maxwell, 275 Cal. App. 2d Supp. 1026, 1029 (governmental interest in immediate inspection for fish would be frustrated by delay).

Similarly in People v. Modesto, 62 Cal. 2d 436, this Court upheld the admission of certain statements made by the defendant "at a time when the officers were concerned primarily with the possibility of saving Connie's life. The paramount interest in saving her life, if possible, clearly justified the officers in not impeding their rescue efforts by informing defendant of his rights." Id., 446.

See also People v. Miller, 71 Cal. 2d 459, 481-82;

People v. Jacobson, supra, 63 Cal. 2d 319, 328.

Referring to the "doctrine of necessity," this Court gave renewed recognition to these principles in the recent case of Horack v. Superior Court, 3 Cal. 3d 720, 725, quoting with approval the following

language from the Roberts decision: "'[n]ecessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose.'"

A compelling justification for the doctrine was expressed in People v. Superior Court, supra, where the Court of Appeal noted:

> "One way of testing the reasonableness of the search is to ask ourselves what the situation would have looked like had another bomb exploded, killing a number of people and perhaps Pulliam himself, while officers were explaining the matter to a magistrate . . ."
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> Id., 6 Cal. App. 3d at 382.
>
> See also People v. Johnson, 15 Cal. App. 3d 936, 939-41.

Similarly in the case at bar the police officers were legitimately concerned with immediately ascertaining whether co-conspirators in the shooting of Senator Kennedy were at large, and if so, whether the attack on Senator Kennedy was but the first round in a plot to assassinate a number of Presidential

candidates or other high government officials. The refusal of appellant, an apparent foreigner, to discuss his identity, his country of origin, or the shooting, his carrying of no identification, and his engaging in evasive verbal fencing with his interrogators, were facts supportive of the police's concern that other assassinations might be imminent.

It is not difficult to envisage what would have been the effect on the nation and its government of two or three more assassinations at that time. The "gravity of the offense" was a factor that the officers could properly take into account.

Brinegar v. United States, 338 U.S. 160, 183 (Jackson, J., dissenting), quoted with approval in People v. Schader, 62 Cal. 2d 716, 724.

See also People v. Smith, supra, 63 Cal. 2d 779, 797;

People v. Johnson, supra, 15 Cal. App. 3d 936, 941.

In anticipation of the likelihood that appellant will deprecate the exigencies confronting the authorities at the time of the search, conducted some ten hours after the shooting, respondent

emphasizes the fact (of which this Court may take judicial notice under Evidence Code sections 451(f), 459) that only two months previously Reverend Martin Luther King, Jr., had been assassinated, and less than five years previously, the victim's brother, President John F. Kennedy. Moreover, the timing of the shooting must have had significance to the authorities, coming as it did only minutes after the announcement of Senator Kennedy's victory in the strongly contested California primary election which placed him in top contention for the Democratic nomination for President of the United States.

It was eminently reasonable for the officers to view as serious the possible threat of a conspiracy to assassinate a number of high government officials, and to view the notebooks as a possible lead to other conspirators. To paraphrase the court's opinion in People v. Superior Court, supra, 6 Cal. App. 3d 379, "One way of testing the reasonableness of the search is to ask ourselves what the situation would have looked like had another [assassination occurred] . . . , while officers were explaining the matter to a magistrate." Id., 382.

Respondent submits that the present case

comes within the principles set forth in the aforementioned cases upholding warrantless searches conducted under immediate need to protect or preserve life or in pursuit of dangerous suspects.

As recently held by the United States Supreme Court,

> "When judged in accordance with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,' Brinegar v. United States, 338 U.S. 160, 175 (1949), the . . . search was reasonable and valid under the Fourth Amendment." Hill v. California, ___ U.S. ___, ___, 39 U.S.L.W. 4402, 4405 (April 5, 1971).

In part appellant's contention relating to the search of the Sirhan residence is also couched in terms of an asserted violation of the Fifth and Fourteenth Amendments' proscription against compulsory self-incrimination.[22/] (App. Op. Br. pp. 446-48.)

Respondent submits that there is no merit

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22/ Contrary to the defendant in Hill v. California, supra, ___ U.S. ___, ___, 39 U.S.L.W. 4402, 4405 (April 5, 1971), where the United States

in appellant's apparent claim that the nature of the seized property as papers somehow accords them a preferential status as items immune from search and seizure.

It has long been settled that:

> "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized . . . ."
>
> Gouled v. United States, 255 U.S. 298, 309. See also Abel v. United States, 362 U.S. 217, 238-40.

Since the rejection in Warden v. Hayden, supra, 387 U.S. 294, 300-01, 307-08, of the "mere evidence" rule, documentary evidence has not been accorded any

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Supreme Court refused to consider the question, appellant appears to have specifically raised this issue below. (Cl. Tr. pp. 416-26.) The Fifth Amendment aspects of appellant's contention are considered here, rather than under the subargument dealing with the consentual justification for the search, because it must be assumed that if Adel Sirhan could effectively waive appellant's Fourth Amendment rights, he could also waive appellant's Fifth Amendment rights.

greater protection against invasion of privacy than other forms of evidence.

See also People v. Thayer, 63 Cal. 2d 635, cert. denied, 384 U.S. 908.

As was held in this Court's unanimous opinion in Thayer,

> "Finally, it should be noted that there are some opinions that construe Gouled v. United States to protect privacy by preserving private papers, such as a personal diary, from any seizure. [Citing cases.] This construction is contrary to the opinion of the court in Gouled . . . ." Id., 642-43.

See also People v. Hill, 69 Cal. 2d 550, 552, aff'd, ___ U.S. ___, 39 U.S.L.W. 4402 (April 5, 1971);

People v. Tiffith, supra, 12 Cal. App. 3d 1129, 1136-37, quoting Stroud v. United States, 251 U.S. 15, 21-22.

Respondent submits that appellant's notebooks were properly received in evidence in view of the exigencies confronting the police on the morning of June 5, 1968.

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C. Appellant's Brother, Adel, the Oldest Male Member of the Sirhan Household, Gave a Valid Consent to the Search of the House, Including Appellant's Bedroom

As previously noted, the circumstances underlying the authorities' decision to search the Sirhan residence are fully set forth at pages 20-22, 29-35, infra, and only those facts having an immediate bearing on the validity of the consent to the search given by Adel Sirhan will be repeated here.

Adel went to the Pasadena Police Station shortly after he and his brother Munir had seen appellant's picture in the newspaper in conjunction with the shooting of Senator Kennedy. (Rep. Tr. pp. 103-04.) At that time the authorities were totally unaware of appellant's identity. (Rep. Tr. pp. 94-95, 115-16.)

When the Los Angeles police officers arrived at the Pasadena station, they identified themselves to Adel, who gave his name and agreed to speak to the officers after being advised of his constitutional right to counsel and to remain silent, and after waiving these rights. Adel was informed that "he didn't have to cooperate with us or speak with us in any manner" and that "he was not under arrest."

(Rep. Tr. pp. 57-58, 91-92, 107-08.)

Adel informed the officers that he was the oldest of the brothers living at the Sirhan residence at 696 East Howard in Pasadena, that his mother and two younger brother, appellant and Munir, were part of the household, and that his father was in a foreign country. Adel "probably" told the officers his age. (Rep. Tr. pp. 59-60, 64, 92, 4314.) His age was 29 years. (Rep. Tr. p. 114.) Appellant's age was 24, and Munir's 21. (Rep. Tr. pp. 120, 4664.)

When asked whether the officers "could search the home," Adel replied that "as far as he was concerned [the officers] could, however it was his mother's house." The officers then asked Adel whether "he would call his mother for permission and he indicated he would prefer that [they] did not talk to his mother at that time;" she was at work, and "he did not want [the officers] to alarm her with what had happened because she did not yet know about it." Adel never said that he had no right to give the police permission to enter the house.[23/] (Rep. Tr. pp. 61, 80, 93.)

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23/ At the pretrial hearing Adel testified in accord with the above-described testimony of the police officers. He admitted having been advised of his constitutional rights and telling the officers,

One of the officers, Sergeant Brandt, was advised by telephone, by Lieutenant Hughes of Rampart Detectives, that the Sirhan residence should be searched in the event Adel had given his consent. (Rep. Tr. pp. 61-62.) Although Munir denied this at the pretrial hearing, he too (Munir) had given his consent that morning at the police station to a search of the Sirhan residence after having been advised of his constitutional right to counsel and to remain silent, and after waiving these rights. Munir was also informed "that he was not under arrest." (Rep. Tr. pp. 62, 98-100, 119-25, 130-31.)

The Sirhan residence consisted of three bedrooms, a living room, a den, and a dining room. Mrs. Sirhan owned the house and had a deed to it. (Rep. Tr. p. 112.) Adel was a part owner of the property until August of 1963, when he and his mother

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"'I have nothing to hide, but the house isn't mine, I do not own the house.'" Adel had told the officers that his mother owned the house, that she knew nothing about the matter, and that he did not "want her disturbed" at work. Adel told the officers "I had no objection" to the house being searched and that "'It is okay with me,'" and he said nothing further on the subject. (Rep. Tr. pp. 105-09.) Mrs. Sirhan testified at the hearing that she had never given Adel or anyone else permission to search any room of the house. (Rep. Tr. p. 113.)

joined in deeding the property to Mrs. Sirhan as sole owner. (Rep. Tr. p. 127.) Appellant did not pay room or board. (Rep. Tr. p. 2456.)

Adel admitted the officers to the house upon arriving with them at approximately 10:30 a.m. (Rep. Tr. p. 4273.) No one else was home at the time. (Rep. Tr. pp. 87, 4309.) He unlocked the door and let the officers in. (Rep. Tr. pp. 62-63.) The officers did not have a search warrant and had not made an attempt to secure the consent of appellant to enter and search. (Rep. Tr. pp. 4274-75.) Adel gave them permission to search appellant's bedroom. (Rep. Tr. pp. 4313-14.) He showed them where it was located, at the rear of the residence. Sergeant Brandt then searched the bedroom in the presence of the other officers and Adel. (Rep. Tr. pp. 64, 75, 4273, 4278, 4309.)

At the time he conducted the search, Sergeant Brandt believed that Adel was a person authorized to consent to a search of the Sirhan residence. (Rep. Tr. pp. 75-76.)

This Court has long recognized "the rule that a search is not unreasonable if made with the consent of a cooccupant of the premises who, by virtue of his relationship or other factors, the officers

reasonably and in good faith believe has authority to consent to their entry. [Citing cases.]" (Emphasis added.)

People v. Smith, supra, 63 Cal. 2d 779, 799.

See also People v. McGrew, 1 Cal. 3d 404, 412-13, cert. denied, 398 U.S. 909;

People v. Hill, supra, 69 Cal. 2d 550, 554, aff'd, ___ U.S. ___, 39 U.S.L.W. 4402 (April 5, 1971).

It has always been the case that "'[t]he recurring questions of the reasonableness of searches' depend upon 'the facts and circumstances--the total atmosphere of the case.'"

Chimel v. California, supra, 395 U.S. 752, 765;

United States v. Rabinowitz, 339 U.S. 56, 63, 66.

Thus in Hill v. California, supra, ___ U.S. ___, 39 U.S.L.W. 4402 (April 5, 1971), the United States Supreme Court upheld a search of the defendant's apartment incident to the arrest of a man whom the arresting officers mistakenly took to be the defendant. The Court held,

"They were quite wrong as it turned out,

and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." Id., ___ U.S. at ___, 39 U.S.L.W. at 4404.

Relying on Brinegar v. United States, supra, 338 U.S. 160, 175, the Court upheld the arrest and search as reasonable and valid "[w]hen judged in accordance with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Id., ___ U.S. at ___, 39 U.S.L.W. at 4405.

The issue at hand is thus whether the trial court properly concluded that the officers who searched the Sirhan residence obtained a valid consent from Adel Sirhan, and if not, whether they reasonably and in good faith believed that Adel had authority under the circumstances to consent to the search in question.

Twice, at the hearing on the motion to

suppress pursuant to Penal Code section 1538.5 and again at the trial, the trial court, after

> ". . . reviewing all the evidence and the arguments and the briefs, was of the opinion that the officers had authority from the one whom they conscientiously and reasonably believed to be the one who could grant the authority.
>
> "Therefore . . . there was consent." (Rep. Tr. p. 4358; see also Rep. Tr. pp. 136-37.)

The resolution of conflicting evidence, presented at a hearing on motion to suppress evidence involving the issue of consent to search, lies with the superior court and will not be disturbed where there is substantial evidence supporting the finding of that court. People v. West, 3 Cal. 3d 595, 602. The same is true with respect to the determination of the issue of consent by the court at the time of trial; this Court will not substitute its judgment for that of the trial court, which heard and observed the witnesses who testified on this question. People v. Carrillo, 64 Cal. 2d 387, 390-91, cert. denied, 385 U.S. 1013.

The propriety of the trial court's ruling is supported by recent case law, and, as will be shown, the cases cited by appellant are all readily distinguishable.

In its recent decision in Frazier v. Cupp, 394 U.S. 731, 740, the United States Supreme Court recognized the constitutional validity of a consent given by one joint possessor of a duffel bag to a search of the bag, including that portion allegedly occupied by the property of the defendant. Similarly this Court in People v. Gorg, 45 Cal. 2d 776, upheld the consent to a search of a room occupied by the defendant, a boarder, given by the home owner, who

> ". . . believed that he had at least joint control over [defendant's] quarters and the right to enter them . . . and authorize a search thereof. Under these circumstances the officers were justified in concluding that [the home owner] had the authority over his home that he purported to have . . . ." Id., 783.

See also People v. Caritativo, 46 Cal. 2d 68, 73, cert. denied, 351 U.S. 972 (same); People v. Pranke, 12 Cal. App. 3d 935, 942-45

(upholding the validity of a consent given by a person in whose custody the defendant had entrusted his personal property).

Tompkins v. Superior Court, supra, 59 Cal. 2d 65, cited by appellant, merely held that

". . . one joint occupant who is away from the premises may not authorize police officers to enter and search the premises over the objection of another joint occupant who is present at the time, at least where as in this case, no prior warning is given, no emergency exists, and the officer fails even to disclose his purpose to the occupant who is present or to inform him that he has the consent of the absent occupant to enter. . . ." Id., 69.

Similarly distinguishable is People v. Cruz, 61 Cal. 2d 861, where instead of seeking consent from the defendant, who was present, to search certain suitcases, the officers searched through various items, including the defendant's suitcase, which they knew neither belonged to, nor had been entrusted to, the custody of a tenant of the apartment from whom a purported consent had been obtained. Id., 866-67.

The case of People v. Egan, 250 Cal. App. 2d 433, cited by appellant, lends support to respondent's position. Although holding that the defendant's stepfather could not give consent to the search of a "kit bag" to which he had no possessory right or control, the court made it clear that the stepfather could consent to "a search of any depository owned and controlled by him as part of the household furniture and furnishings." Id., 436. The court noted that the defendant paid "[n]o rent or other remuneration . . . for his occupancy."[24/] Id., 434.

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24/ The other cases cited by appellant are similarly distinguishable. In People v. Murillo, 241 Cal. App. 2d 173, the court upheld the right of the defendant's mistress, an informer, to consent to a search of their jointly occupied apartment but not to a search of the defendant's attache' case. People v. Fry, 271 Cal. App. 2d 350, which respondent submits is at variance with decisions of this Court and the Courts of Appeal, nevertheless is distinguishable in that there the officers had knowledge that the defendant's wife, whose consent was solicited, had been explicitly instructed by the defendant not to consent. Id., 357. Cf. In re Lessard, 62 Cal. 2d 497, 504-05, upholding a wife's consent to the search of a home in the absence of her husband; People v. Linke, 265 Cal. App. 2d 297, 315-16, and People v. Brown, 238 Cal. App. 2d 924, 926-27 (overruled on another point in People v. Doherty, 67 Cal. 2d 9, 15), both upholding a wife's consent to a search of a home over the objection of the husband.

Stoner v. California, 376 U.S. 483, held that "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the

In Vandenberg v. Superior Court, 8 Cal. App. 3d 1048, the court upheld the search of a bedroom occupied jointly by the 19-year-old defendant and his father, despite the request of the defendant,

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law of agency or by unrealistic doctrines of 'apparent authority'" (emphasis added), id., 488, in that case the contention that the night clerk of a hotel had implied authority from a guest to consent to the search of the guest's room. At the same time the court implied that a reasonable basis for an officer's conclusion of apparent authority would validate a search conducted in reliance thereon. Id., 489. With respect to a landlord's right of entry, see also Chapman v. United States, 365 U.S. 610, 616-18, but compare People v. Superior Court, 3 Cal. App. 3d 648, 653-60; People v. Rightnour, 243 Cal. App. 2d 663, 668.

In People v. Stage, 7 Cal. App. 3d 681, 683, the court recognized that the consent given by the registered owner of a vehicle for a search of the vehicle was not a consent to search a jacket known by the officer to belong to one of the other occupants. This is obviously quite a different matter from the search of a room and its furnishings in which a defendant such as appellant has no possessory interest.

The dictum in Reeves v. Warden, Maryland Penitentiary, 346 F.2d 915, 925 (4th Cir. 1965), that only the defendant, a guest in his sister's house, could consent to a search of the room set aside for his use, is clearly erroneous. Respondent does not dispute the court's holding that the defendant's mother, also a guest in the house, lacked authority to give a valid consent to a search of the house, id., 924-25, but it is submitted that the sister could properly have given consent to a search of the room in question.

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who was present, that his father deny permission. The court stressed that "there is no evidence that the [defendant] had any legal right to possession of the premises--the trial court found that [he] was a tenant 'in sufferance' of his father with no control over the use of the premises." Id., 1054. The court held, "In his capacity as the owner of the legal interest in the property, a father can transfer to the police the limited right to enter and search the entire premises including that portion of the real property which has been designated by the parent for the use of his children." Id., 1055. The seizure of contraband in the bedroom on a towel rack and in a dresser drawer was upheld. Id., 1055-56. Similarly in People v. Galle, 153 Cal. App. 2d 88, 89-90, the court upheld the search of the defendant's jacket in his bedroom closet pursuant to the consent given by his mother.[25/]

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25/ Cf. Beach v. Superior Court, 11 Cal. App. 3d 1032, in which it was held that a sister, who shared an apartment with her two brothers, could not consent to the search of the bedroom occupied exclusively by her brothers and another female; and People v. Jennings, 142 Cal. App. 2d 160, 169, where the court held that under the circumstances of that case a minor daughter did not validly consent to the search of her father's home while the father was in custody.

The recent case of People v. Daniels, 16 Cal. App. 3d 36 (petition for hearing pending), is particularly in point and merits quotation at length. In that case, on the morning of an explosion in which the defendant's wife was almost killed,

> ". . . police officers went to a residence owned by defendant's mother with whom he was staying; entered with her permission; asked for defendant . . . ." Id., 41.

The defendant was present. Asked whether her son paid rent, the mother replied that he did not, that "'he merely stayed there'" "free, not paying any rent," and that the house was hers. Thereupon the officers searched the defendant's bedroom, finding evidence on top of the dresser, inside the dresser drawers, between the mattresses of the bed, and inside the defendant's suitcase. Id., 42. The court concluded:

> "We hold the mother was authorized to consent to the search of the premises owned by her, including the bedroom in which the son slept, the dresser, dresser drawers and the bed in that bedroom; in any event, the search thereof was reasonable because conducted under a reasonable belief,

in good faith, the mother was authorized to consent; and, for these reasons, the search was legal; but the mother did not have authority to consent to the search of the suitcase; any reliance upon a claimed consent to search the suitcase was unreasonable: and, for this reason, the search of the suitcase was illegal.

"Both sides direct major attention to the general rules governing a search upon consent by a co-occupant, and support their respective positions by an application of these rules to their interpretation of the evidence.

". . . .

"Pertinent and distinguishing circumstances at bench include the fact the person consenting to the search was the mother of the defendant who owned exclusively the entire premises, including the bedroom in which he slept. Consent to search was volunteered by the mother rather than requested by the officers. Defendant was not in the bedroom at the time the search was conducted.

"The evidence supports the inference, implicit in the order denying defendant's motion to suppress, defendant did not have exclusive possession or control over the bedroom which he was permitted to use; and his mother, by virtue of her ownership and the circumstances in the case, had the right to enter and search the bedroom at will. . . .

"The search of the bedroom used by a son living with a parent who owns the premises of which the bedroom is a part, when made with the consent of the parent, is reasonable, absent circumstances establishing the son has been given exclusive control over the bedroom. Parents with whom a son is living, on premises owned by them, do not ipso facto relinquish exclusive control over that portion thereof used by the son. To the contrary, the mere fact the son is permitted to use a particular bedroom, as such, does not confer upon him exclusive control thereof. His occupancy is subservient to the control of his parents. He may be excluded from the premises by them

at any time. They may enter and search the room at will, or may authorize others to make such a search.

"In the case at bench the fact defendant was an adult or was present in an adjoining room while the search was conducted did not derrogate the mother's authority to consent.

"In any event, the evidence at bench supports the finding, implicit in the order of denial, the officers reasonably and in good faith believed defendant's mother had authority to consent to the search of the bedroom occupied by him; and, under these circumstances, the search was reasonable. Contrary to defendant's contention, the fact he was present in an adjoining room when the search occurred does not insulate the situation at bench from application of the foregoing rule. The mere presence of the defendant on the premises does not dictate a finding, as a matter of law, the officers did not reasonably believe his mother was authorized to consent to a search of the bedroom. This

is not a case in which the defendant personally objected to the search under circumstances which would have supported a conclusion he was in exclusive possession of that portion of the premises searched. . . . The circumstances at bench, bearing in mind defendant's mother invited the officers to search the room in which her son slept, told them she was the owner of the house and her son lived there 'free', directed them to the room in question and accompanied them during the search, support a finding the officers reasonably believed the mother had authority to consent." (Citations omitted.) People v. Daniels, supra, 16 Cal. App. 3d at 42-45.

Application of the principles in the foregoing authorities to the case at bar establishes both that Adel Sirhan had actual authority to consent to the search and that the officers in any event reasonably and in good faith believed that he was a person with authority to permit the search. The following facts are particularly significant in this regard:

1. Consent to the search was volunteered by Adel, the oldest male (29 years of age) in the household, in the sense that had he and his brother Munir remained silent instead of proceeding to the police station, appellant's identity might have remained unknown indefinitely. The free and voluntary nature of Adel's consent is further indicated by his having been advised, unnecessarily,[26/] of his right to counsel and to remain silent. No coercion or assertion of authority was employed to secure his consent.

Mann v. Superior Court, 3 Cal. 3d 1, 8.

Cf. Bumper v. North Carolina, 391 U.S. 543, 548.

(2) Appellant had no possessory interest in the property, and his mother was sole

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26/ See People v. Fuller, 268 Cal. App. 2d 844, 852, and cases cited. Nor, contrary to appellant's contention (App. Op. Br. pp. 453-56), was there any requirement that the valid consent be preceded by a warning that it need not be given, or that evidence obtained in the ensuing search could be used against the person giving his consent or against another person having an interest in the property. People v. Superior Court, 71 Cal. 2d 265, 270(n.7), and cases cited; People v. Pranke, supra, 12 Cal. App. 3d 935, 945; People v. Stark, 275 Cal. App. 2d 712, 714-15; People v. Bustamonte, 270 Cal. App. 2d 648, 653, People v. Linke, supra, 265 Cal. App. 2d 297, 314-15.

owner of the house and the furnishings. Adel had been part owner until less than five years previously, at which time he deeded his interest to Mrs. Sirhan.

(3) Appellant was not present and the record does not indicate he expressly withheld consent to search from the officers or anyone else. It was immaterial that he was in custody at the time.

People v. Terry, 57 Cal. 2d 538, 558-59, cert. denied, 375 U.S. 960.

In any event it is respondent's position that Mrs. Sirhan's exclusive possessory interest in the bedroom and its furnishings would have given her the right to authorize the search even had appellant been present and voiced an express objection to the search. Moreover, the two notebooks received in evidence (Exhs. 71 & 72) were in plain view in appellant's room. (Rep. Tr. pp. 4281-83, 4300-03, 4320.) Only the third notebook (Exh. 73, which contained nothing pertinent to the case and was thus never received in evidence) and the United States Treasury envelope (Exh. 74) were taken from inside the dresser drawer. (Rep. Tr. pp. 4303-05, 4310, 4349-50, 8252-53.) Secondly, respondent concludes that, in the absence of Mrs. Sirhan and in

view of Adel's age and position in the family, Adel could exercise equal possessory rights with his mother, which were until recently formally reflected in a deed, to authorize a search of the entire premises by the police. Whatever Mrs. Sirhan and Adel had lawful access to, in light of appellant's status as a non-paying guest and family member, was legitimately accessible to the police officers provided they had the consent of Mrs. Sirhan or Adel. To even suggest that the validity of the conviction of Senator Kennedy's assassin could turn upon the technical transfer of title to the Sirhan property in 1963 entirely back to Mrs. Sirhan, would be to justify the frequent popular outrage and exasperation at what has been termed the "game theory" aspect of the criminal law. People v. Gorg, supra, 45 Cal. 2d 776, 783. See also Williams v. Florida, 399 U.S. 78, 82. Thirdly, aside from Adel's actual authority, the various representations made by him, including his admitted plea that the officers not "alarm" his mother "with what had happened," led the officers to rely reasonably upon his apparent authority to consent to the search, and these representations therefore bound the entire Sirhan family, including appellant.

D. The Seizure of the Envelope From the Trash Was Valid Under the Rule of People v. Edwards, 71 Cal. 2d 1096, Which Moreover Should Not Be Given Retroactive Effect

The facts underlying the seizure of the envelope from the trash are as follows. At 8:00 a.m. on the morning of June 6, 1968 (the day following the search of the Sirhan residence), Officer Thomas Young of the Pasadena Police Department arrived at the Sirhan residence, having been "assigned to security at the rear of the residence." His duty was to guard the premises from unauthorized persons. At approximately 11:00 a.m., upon discarding a paper cup of coffee into the trash which lay inside several boxes and cans of trash and garbage in a "rear yard to the rear of the residence," he observed lying in one such box the envelope which bore on its face the return address of the Argonaut Insurance Company. He examined it merely out of curiosity. The trash area was located on the Sirhan property. Officer Young retained possession of the envelope and brought it to the police station. (Rep. Tr. pp. 4326-29, 4332-34.)

Initially, respondent submits that the valid consent given by Adel to the search of the Sirhan residence on the previous day (see the preceding

subargument herein) extended to a search of the trash area at the rear of the house on the following day. See People v. Hickens, 165 Cal. App. 2d 364, 367-69. Cf. People v. Gorg, supra, 45 Cal. 2d 776, 782-83. Although a consent once given may be subsequently withdrawn, People v. Martinez, 259 Cal. App. 2d Supp. 943, 945-46, there is nothing in the record to indicate that Adel expressed any desire to withdraw his consent.

Respondent recognizes that even in the absence of a withdrawal of consent, a consent will not continue as an indefinite authorization for search by the police under changed circumstances. However, it is reasonable to interpret the scope of Adel's consent as continuing up to the time of the seizure of the envelope from the trash 24 hours later, particularly since the police were on the premises in conjunction with the same matter that had initially brought them there, the shooting of Senator Kennedy, and since they were there to provide security as the result of the Sirhan family's identity having become publicly known.

Cf. People v. Johnson, 70 Cal. 2d 469, 477 (a

single admonition as to constitutional rights may be sufficient to cover subsequent interrogations).

Secondly, respondent submits that appellant's attempt to invoke the rule of People v. Edwards, 71 Cal. 2d 1096, restricting the circumstances under which a person's trash receptacles may be subjected to search by the police, must fail since Edwards is not entitled to retroactive application in light of applicable judicial policy considerations.

Edwards itself, in another Fourth Amendment context, held the new rule of Chimel v. California, supra, 395 U.S. 752, not to be retroactive,[27/] id., 1107-10, emphasizing the primary considerations of "'(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'" Id., 1107-08.

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27/ See also Williams v. United States, ___ U.S. ___, ___, 39 U.S.L.W. 4365, 4368 (April 5, 1971); Hill v. California, supra, ___ U.S. ___, ___, 39 U.S.L.W. 4402, 4404 (April 5, 1971).

These same considerations militate against retroactive application of the new rule announced in Edwards.

It is particularly noteworthy that in a case of the present magnitude the trial court, after expressing initial reservations concerning the seizure of the envelope from the trash, felt free to rely expressly on the case of People v. Bly, 191 Cal. App. 2d 352, in denying the motion to strike. (Rep. Tr. pp. 4397-4401.) The trial court had no way of knowing that only a few months later this Court would expressly disapprove the Bly case, People v. Edwards, supra, 71 Cal. 2d at 1105, even though Bly had been consistent with other California law on the subject.

> People v. Edwards, supra, 71 Cal. 2d at 1102-03.

Respondent strongly urges that this Court limit its ruling in Edwards to prospective application. It would indeed be ironic if the Edwards case, limiting Chimel to prospective application, were held to have established fully retroactively

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its own Fourth Amendment rule.[28/]

Turning to the merits of appellant's contention, it is readily apparent that there are significant distinctions between the search which took place in the Edwards case, where this Court held unlawful the search of the defendants' trash can, and the search presently in issue. The Court's opinion was premised upon the nature of the Fourth Amendment guarantee against unreasonable search and seizure as a protection of persons and their reasonable expectations of privacy rather than a protection of constitutionally protected places. The search in Edwards was found to have infringed upon a reasonable expectation of privacy on the part of the defendants.

People v. Edwards, supra, 71 Cal. 2d 1096, 1104.

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28/ At this date the issue of Edwards' retroactivity has not been considered by any reported California decision, with the exception of People v. Krivda, 12 Cal. App. 3d 963, 966, petition for hearing granted January 14, 1971, which found that the new rule should be applied prospectively only. See also the decisions limiting the rule announded in Eleazer v. Superior Court, 1 Cal. 3d 847, regarding efforts required to locate informers, to prospective application. E.g., People v. Pargo, 11 Cal. App. 3d 528, 531-35; People v. Fortier, 10 Cal. App. 3d 760, 766-67; People v. Helmholtz, 10 Cal. App. 3d 441, 446-50.

Significantly, in Edwards "the trash can was within a few feet of the back door of defendants' home and required trespass for its inspection." Id., 1104 (emphasis added). "In the light of the combined facts and circumstances it appears that defendants exhibited an expectation of privacy," which the Court termed "reasonable under the circumstances of the case." Id.

In the present case the officer who came across the envelope in the trash testified that he had been assigned to security at the rear of the Pasadena residence in order to guard the premises from unauthorized persons. There was no evidence in the record to contradict this, and his description of his function is supported by the fact that he was a Pasadena officer rather than a member of the Los Angeles Police Department, which was conducting the investigation (and which had conducted the search of the Sirhan residence on the previous day). Thus the officer was not committing a trespass; he was lawfully on the premises.

Instead the facts of the present case bring it within this Court's characterization of People v.

Berutko, 71 Cal. 2d 84: "It is clear that this case does not involve the difficult questions which arise when the officer's observation is secured from a vantage point which he has gained by trespass. . . . Rather, the instant case involves observation by an officer from a place where he had a right to be," which was a common area available to other tenants of the apartment building from which the interior of the defendant's apartment could be observed through an opening in the curtains. Id., 91.

The Court held in Berutko that "[w]hen, as in the instant case, a person by his own action or neglect allows visual access to his residence . . . , he may not complain." Id., 93-94. Similarly by June 6, 1968, neither appellant nor the other members of his family could harbor any reasonable expectation of privacy once the world had learned of appellant's identity as the political assassin of Senator Kennedy and it had become necessary to station officers on the Sirhan property.

These circumstances indicate that the officer who observed the envelope in the trash, while guarding the rear of the residence, was where he had a right to be at that time, and that therefore

the Sirhans had no reasonable anticipation of privacy at their home, at least with respect to the outlying portions of the premises such as the area where the trash was kept. There is no evidence indicating that the officer was on the premises contrary to the wishes of Mrs. Sirhan, Adel, or Munir. Presumably the Sirhan family welcomed the police protection of their lives and property; this Court may judicially notice (Evid. Code §§ 451(f), 459) the inevitable attendance of curiosity-seekers at the periphery of major events as well as the harm that befell the assassin of Senator Kennedy's brother, President John F. Kennedy, within a short period of that political assassination. The record reflects the following situation confronting the officers when they arrived to search the house on the preceding day. "We were met by a group from Burglary Auto Theft Division who had been sent to watch the house. There were a large number of newspaper reporters at the time at the scene and they assisted us in getting through the crowd into the house." (Rep. Tr. p. 63.)

Significantly, between 12:00 and 1:00 p.m. on the day preceding the seizure of the envelope, apparently upon learning of appellant's involvement in

the shooting of Senator Kennedy, Mrs. Sirhan had found it advisable to leave the Sirhan residence and move in with friends, with whom she remained for eight to ten days. (Rep. Tr. p. 113.) The record does not indicate whether the other members of the Sirhan household did the same. Cf. People v. Sanchez, 2 Cal. App. 3d 467, 474 (governmental intrusion involving abandoned house, frequented by prowlers, was not unreasonable in view of the lessened expectation of privacy). Under the circumstances the Pasadena Police Department would have been subject to accusations that it was derelict in its duty, had officers not been stationed to guard the premises.

Since he was in a position where he had a right to be, the officer who observed the envelope among the trash as he discarded a paper cup of coffee into the trash receptacles was not conducting a search, much less an unreasonable search. To observe what is in plain sight is not to search.

> Harris v. United States, 390 U.S. 234, 236. See also People v. Bradley, 1 Cal. 3d 80, 84-85 (marijuana plants properly seized by the police from the defendant's rear yard were visible to delivery men and others who came

to the defendant's door).

Even had the officer rummaged through the trash, and the record does not indicate that this was the case, this would not invalidate the seizure of the envelope under the circumstances of the present case. Analogous are the facts in People v. Maltz, 14 Cal. App. 3d 381, where an officer situated in an area adjacent to a street and accessible to the public stuck his hand 10-12 inches inside an opening under a garage door. Id., 388-89. The court held that although the officer's action

> ". . . could not be classified as a forcible entry, nevertheless it was technically an entry or trespass. As in the case of a search involving such a minor trespass, however, we do not think that the conflicting fundamental policy considerations involved in determining whether a seizure is reasonable ought to depend upon the words 'entry' or 'trespass' or upon technical rules of property. [Citing cases.] The problem involves a balancing between the rights of the individual and the rights of the public to proper and

efficient law enforcement [citing cases] . . . ." Id., 398.

See also People v. Terry, supra, 70 Cal. 2d 410, 427-28.

For the foregoing reasons respondent submits that the seizure of the envelope from the trash area was proper.

E. Even Had the Notebooks or the Envelope From the Trash, or Both, Been Improperly Received in Evidence, Any Such Error Would Be Harmless Beyond a Reasonable Doubt in View of the Abundant Other Evidence of Premeditation and Deliberation

Respondent submits that even had the search which uncovered the notebooks, or the seizure of the envelope from the trash, or both, been invalid and the evidence in question improperly received, any such error would not require reversal of the judgment.

The rule that "a federal constitutional error can be held harmless" where the reviewing court is able "to declare a belief that it was harmless beyond a reasonable doubt," Chapman v. California, 386 U.S. 18, 24, is applicable to the admission of

evidence obtained by search and seizure.

People v. Chambers, 276 Cal. App. 2d 89, 101.

See also People v. Bradley, supra, 1 Cal. 3d 80, 89.

It is readily apparent that if the admission in evidence of the envelope from the trash were improper, any error would be rendered harmless by the proper admission of the notebooks. Conversely, error in the admission of the notebooks would be rendered harmless by the proper admission of the envelope from the trash. The notebooks and the envelope are cumulative evidence on the issue of premeditation, each reflecting a verbalization of appellant's premeditation and deliberation upon the contemplated assassination of Senator Kennedy.

But even assuming that both the notebooks and the envelope had been improperly received in evidence, there was abundant other evidence of premeditation and deliberation which would be sufficient to compel this Court to find the purported error harmless beyond a reasonable doubt.

Among this independent evidence of the intent requisite for first-degree murder are (1) appellant's

purchase of the murder weapon almost six months prior to the assassination, (2) appellant's statement to the trash collector Mr. Clark, two months prior to the assassination, that appellant was "planning on shooting" "that son-of-a-bitch," Senator Kennedy, (3) appellant's stalking of the victim -- closely following his whereabouts in Oregon and Washington, as reflected by appellant's own testimony, (4) appellant's trips to the shooting range, (5) his trip to the Ambassador Hotel two days prior to the assassination, and (6) evidence of his conduct immediately prior to the assassination, including his asking of questions relative to Senator Kennedy's intended route and security protection, his conduct during and immediately following the assassination, including his statement that he could "explain" and had committed his act "for my country," and his carrying on his person clippings relative to Senator Kennedy and the Senator's favorable position toward Israel, while leaving all his personal identification in his parked vehicle.

For the foregoing reasons it is submitted that appellant's contentions relating to search and seizure, even were they accepted as meritorious,

provide no basis for reversal of the judgment.

IV

APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE PROSECUTION'S DECISION TO PROCEED AGAINST APPELLANT BY WAY OF GRAND JURY INDICTMENT RATHER THAN PRELIMINARY HEARING AND INFORMATION

Appellant makes the unmeritorious contention that "the prosecution's selection to seek a grand jury indictment as opposed to a preliminary hearing was arbitrary and capricious and constituted an invidious discrimination against appellant denying him both due process and equal protection of the laws." (App. Op. Br. p. 463.)

Interestingly enough, defendants have contended with equal vigor, and with equal lack of success, that they may constitutionally be accused only by way of indictment.

See Hurtado v. California, 110 U.S. 516, 538;
People v. Stephens, 266 Cal. App. 2d 661, 662-63;
People v. Hamilton, 254 Cal. App. 2d 462, 466;
People v. Stradwick, 215 Cal. App. 2d 839, 840-41.

In the fiscal year preceding that of appellant's indictment, 85% of all felony proceedings in

California Superior Courts originated in preliminary hearings and informations. The total of preliminary hearings conducted that year was in excess of 71,000.

See authority cited in People v. Green, 70 Cal. 2d 654, 664(n.9), vacated, 399 U.S. 149.

Just as the customary use of prosecutorial discretion whether to file (or dismiss) charges does not violate the constitutional provisions in question, Oyler v. Boles, supra, 368 U.S. 448, 454-56; In re Finn, 54 Cal. 2d 807, 812-13, so it is well settled that these rights are not infringed by prosecutorial discretion[29/] whether to proceed by grand jury indictment or instead by way of preliminary hearing and information. Nor does the decision to proceed by indictment unconstitutionally deny the procedural rights which would have been available to appellant at a preliminary hearing.

People v. Pearce, 8 Cal. App. 3d 984, 988-89;
People v. Newton, 8 Cal. App. 3d 359, 388;
People v. Rojas, 2 Cal. App. 3d 767, 771-72;
People v. Flores, 276 Cal. App. 2d 61, 65-66.

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29/ Cal. Const., art. I, § 8; Pen. Code §§ 682, 737.

See also Jaben v. United States, 381 U.S. 214, 220;

Smith v. United States, 360 U.S. 1, 9-10.

There was also no impropriety in the decision to dismiss the complaint initially filed before a magistrate and then to obtain an indictment charging an offense arising out of the same occurrence.

People v. Combes, 56 Cal. 2d 135, 145.

The objections voiced by appellant to the indictment procedure would more properly be directed to the Legislature than to this Court. The short answer to the present contention is that it is at best illogical to attack as unconstitutional an age-old procedure which itself is embodied in the Constitution's Bill of Rights--the Fifth Amendment's specific provision that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury." Nor has appellant demonstrated the existence of any invidious discrimination in the decision which defendants are to be accused by indictment, such as himself, and which are to be charged by information following a preliminary hearing.

V

THERE WAS NOTHING IMPROPER OR UNFAIR IN THE PROCEDURES BY WHICH THE GRAND JURY AND THE PETIT JURY VENIRE WERE SELECTED

Appellant contends that the alleged exclusion of racial minorities and other identifiable segments of the general population from the grand jury which indicted appellant, and from the jury venire from which the jury that tried appellant was selected, deprived him of due process of law and equal protection of the laws under the Fourteenth Amendment to the federal Constitution. (App. Op. Br. pp. 479, 493.)

A. This Court Should Not Reach the Merits of Appellant's Attack on the Selection of the Grand Jury

At the outset respondent disputes appellant's implied premise that an impermissible practice in the selection of grand jurors could affect the validity of the conviction. Respondent recognizes that this Court has held that defects in the procedures by which a defendant is bound over to superior court may merit reversal of the judgment of conviction. People v. Elliot, 54 Cal. 2d 498, 503. Nevertheless respondent finds highly persuasive the following observations

of Justice Jackson, dissenting in Cassell v. Texas, 339 U.S. 282: "This Court never has explained how discrimination in the selection of a grand jury, illegal though it be, has prejudiced a defendant whom a trial jury, chosen with no discrimination, has convicted." Id., 301. Stressing that the grand jury does not convict but only accuses, and that its accusations must be proved beyond a reasonable doubt before a trial jury, Justice Jackson opined that following the defendant's having been found guilty, "it is frivolous to contend that any grand jury, however constituted, could have done its duty in any way other than to indict." Id., 302. He concluded, "I would treat this as a case where the irregularity is not shown to have harmed this defendant, and affirm the conviction." Id., 305. See also People v. Bradford, 70 Cal. 2d 333, 344, cert. denied, 399 U.S. 911 ("Once an accusatory pleading has been filed . . . , a defendant is no longer held on the arrest warrant, and thus he cannot complain solely on the basis of an alleged defect in the issuance of the warrant"), citing Frisbie v. Collins, 342 U.S. 519. To be distinguished is the situation where the attack on the method of grand

jury selection is made prior to trial.[30/]

Respondent submits that Justice Jackson's observations apply a fortiori to the present case, involving as it does a defendant who committed his act of political assassination before the eyes of a large number of persons and who admitted in the initial voir dire of the jury that there was no dispute as to whether he had shot Senator Kennedy to death. In this posture of the case, it seems rather absurd and beside the point to be three years later evaluating the racial and socio-economic background of the 23 jurors who, on the day following Senator Kennedy's death, did what any imaginable composite of grand jurors would do in returning an indictment of murder. This is also not the context in which this Court deems it expedient to reach a constitutional issue.

In re Cregler, 56 Cal. 2d 308, 313.

See also United States v. Raines, 362 U.S. 17, 20-24.

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30/ See People v. Superior Court, 13 Cal. App. 3d 672, 680-81; Montez v. Superior Court, 10 Cal. App. 3d 343; Castro v. Superior Court, 9 Cal. App. 3d 675, 680 & n.6.

B. Appellant Has Failed to Meet His Burden of Establishing a Prima Facie Case of Purposeful Discrimination Against Any Identifiable Group of the County Populace in the Selection of the Grand and Petit Jurors, Whose Numbers Included Three Negroes, Three Mexican-Americans, and One Arab

The merits of appellant's contentions relating to the selection of the grand jurors and the petit jurors are treated together, inasmuch as the constitutional standards controlling the selection of jurors are the same in both instances.

Pierre v. Louisiana, 306 U.S. 354, 362;

People v. Newton, supra, 8 Cal. App. 3d 359, 388.

The authorities defining these standards are collected in the Newton case, which held with respect to the selection of jurors:

". . . They must be selected in a manner which does not systematically exclude, or substantially underrepresent, the members of any identifiable group in the community. (Whitus v. Georgia (1967) 385 U.S. 545, 548-552; Hernandez v. Texas (1954) 347 U.S. 475, 476-478; People v. White (1954) 43 Cal.2d 740, 749-753.) Such 'purposeful discrimination,' however, 'may not be assumed or merely

asserted'; it must be proved (Swain v. Alabama (1965) 380 U.S. 202, 205), and defendant bore the burden of making a prima facie case that it existed here. (Whitus v. Georgia, supra, at P. 550.) . . ." (Parallel citations omitted; emphasis added.) People v. Newton, supra at 388-89.

At the proceedings below, appellant moved, on the grounds presently relied upon, to quash the indictment and the petit jury list. (Cl. Tr. pp. 148, 181.) Defense counsel expressly disclaimed that there had been noncompliance with the foregoing standard when he stated his objection:

". . . I want to make clear the defendant's position in this matter.

"First, we make no claim that any of the Superior Court Judges of this County did other than follow the law as is laid down in the Penal Code.

"We also want to make perfectly clear that we make no contention that any of the Judges purposefully discriminated in the selection of the Grand Jurors.

"Our position is that the very system

itself . . . has the result of being discriminatory." (Rep. Tr. p. 1924 (emphasis added).)

In addition to the extensive memoranda of points and authorities submitted by both sides (Cl. Tr. pp. 99-140, 164-78, 383-92, 470-72, 492-94), the defense introduced the following evidence in support of its motions in the proceedings below.[31/]

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31/ The trial court declined to admit in evidence 1010 pages of transcript, offered by the defense, from the case subsequently determined on appeal as Castro v. Superior Court, supra, 9 Cal. App. 3d 675. (Rep. Tr. p. 8978.) Nonetheless, Appellant's Opening Brief quotes extensively from the record and the exhibits in the Castro case as well as from the record and the exhibits in the case subsequently determined on appeal as Montez v. Superior Court, supra, 10 Cal. App. 3d 343, which matters are also outside the present record. The Court of Appeal never reached the present issues in the Castro case and did not summarize the evidence relating thereto. However, the court's opinion in Montez, supra at 346-47, 350, makes reference to such evidence produced in the Castro case. Castro, like the present case, involves the 1968 Los Angeles County Grand Jury and Montez the 1969.

Of course this Court normally will not consider on appeal matters which are not part of the record of the proceedings below. People v. Washington, 71 Cal. 2d 1061, 1086.

This Court may take judicial notice (Evid. Code §§ 451(a), 452(d), 459) of the written opinion of the Los Angeles Superior Court, Judge Arthur L. Alarcon, presiding, denying the motion to quash the indictment in the Montez case (Superior Court No. A-244906) at the conclusion of a six-week hearing on remand from the Court of Appeal following its decision in Montez v.

Professor Robert Schultz testified regarding the age, racial, and socio-economic background of the nominees for the 1968 Los Angeles County Grand Jury. He concluded that the median age of the nominees was greater than that of the general county population and the educational background substantially higher. (Rep. Tr. pp. 1950, 1962-63.) The nominees also had a higher grade of employment. (Rep. Tr. pp. 1967-72.) The western portion of the county containing more expensive homes was overrepresented among the nominees, and the area of the county which contained a large Negro population was underrepresented. (Rep. Tr. pp. 1975-80.)

Professor Raymond Schultz corroborated the foregoing testimony of his brother, Professor Robert Schultz. (Rep. Tr. p. 2105.) He also analyzed

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Superior Court, supra, 10 Cal. App. 3d 343. The opinion of the superior court, filed March 31, 1971, holds, inter alia, that "[t]he evidence clearly shows that none of the selectors of the Grand Jury intentionally, deliberately, arbitrarily or systematically excluded or purposely discriminated against persons identifiable as Mexican-Americans from the grand juries for the years 1959 to 1968" and that "a substantial number of the selectors . . . took affirmative steps to find eligible and qualified persons identifiable as Mexican-Americans to serve on the Grand Jury." (Pp. 13-14.) One hundred and nine superior court judges were among the witnesses who testified at the hearing. (P. 10.)

questionnaires returned to the defense by 89 of the superior court judges of the county. (Rep. Tr. p. 2107.) Among the conclusions he arrived at were that the judges resided in the same relative area as their nominees, which areas had high home values. (Rep. Tr. pp. 2113, 2124.) More than half of the judges in question indicated that they had made an "affirmative effort to select grand jurors from minority groups," although some stated they were unable to secure any such nominees because grand jury service "tends to work an undue economic hardship." (Rep. Tr. pp. 2132-33.) Two-thirds of the judges indicated that the persons with whom they were acquainted included individuals qualified for grand jury service from all of the major racial, age, and geographical segments of the population. (Rep. Tr. p. 2133.) All answered that they did not deliberately, systematically, or arbitrarily exclude any segment of the general population from their nominees and that their nominations were based on the qualifications of the nominees. (Rep. Tr. p. 2134.) The estimated Negro population of the county in 1965 was approximately 13% of the total population and the estimated Mexican-American population

was approximately 12%. (Rep. Tr. p. 2136.)

Three judges of the superior court were called by the defense and testified as to the background of some of their nominees for the grand jury. Judge Arthur L. Alarcon testified that in selecting nominees for the 1968 grand jury he made an affirmative but unsuccessful effort to nominate at least one who was Mexican. (Rep. Tr. pp. 2024-25.) A Mexican-American nominated by Judge Alarcon had served on the 1965 grand jury. Judge Alarcon had deliberately selected relatively young nominees for the 1968 grand jury. (Rep. Tr. pp. 2026-27.) Judge Alarcon also took into account the serious civil responsibilities required of grand jurors in overseeing the operation of the county government and the time (3-5 days a week for an entire year) that grand jury duty requires in Los Angeles County. (Rep. Tr. pp. 2028-31.) Judge Edward R. Brand testified that he did not concern himself with the ethnic background of his grand jury nominees and did not deliberately exclude any group. (Rep. Tr. pp. 2039, 2044-45.) Judge Kenneth N. Chantry made affirmative efforts to select his grand jury nominees from minority groups and sought to obtain a "cross-section" of

nominees. He never deliberately excluded any group. (Rep. Tr. pp. 2952-53.)

William Goodwin, Jury Commissioner of Los Angeles County, testified that petit jurors were selected exclusively from the Registrar of Voters list by random selection. (Rep. Tr. pp. 311-12.) Prospective jurors whose occupations are among those exempted by Code of Civil Procedure section 200 are automatically excused unless they waive exemption. (Rep. Tr. pp. 315-17.) Rule 25(1), Rules of the Los Angeles Superior Court, provides in part that persons qualified to render jury service shall not be excused except for the causes set forth in Code of Civil Procedure section 201 and that "[n]o prospective juror shall be rejected because of political affiliation, religious faith, race, color, social or economic status, occupation or sex." (Rep. Tr. p. 319.) There has not been any systematic exclusion of jurors based upon any of the aforementioned categories listed in rule 25(1). (Rep. Tr. p. 321.)

With reference to the grand jury, Mr. Goodwin testified that selection is in accordance with rule 29, Rules of the Los Angeles Superior

Court. (That rule is set forth at Cl. Tr. pp. 176-78. See also Pen. Code §§ 903-903.4.) Each judge of the court may nominate two persons, and pursuant to the procedure followed for the past four or five years each judge is instructed by the grand jury committee of the court that the "'Grand Jury should be representative of a cross section of the community'" and that therefore nominations should be made "'from the various geographical locations within the County, the different racial groups and all ethnic levels.'" (Rep. Tr. pp. 2004-05, 2010.) This committee, which was also charged with determining possible withdrawals from the list of nominations, was comprised of eight judges, one of whom was Negro and one of Chinese extraction. (Rep. Tr. pp. 2008, 2012.) At the time the nominations were made for the grand jury which ultimately indicted appellant, the Los Angeles Superior Court included, among its approximately 133 judges, four Negroes, four judges of Spanish-American descent, one of Chinese descent, and one of Japanese descent. (Rep. Tr. pp. 1894, 2016.)

The requisite qualifications for grand jurors are set forth in Penal Code sections 893 and 894. Nominees must be selected from the

judicial or supervisorial districts of the county in proportion to the population of the districts. Pen. Code § 899. The requisite number of grand jurors are chosen by lot from the names of nominees placed in the grand jury box. Pen. Code §§ 900.1, 902.

It was stipulated by counsel that the Grand Jury which indicted appellant had among its 23 members two Negroes and one Arab, a Mrs. Shalhoub, whose father was born in Syria and mother born in Lebanon. (Rep. Tr. pp. 1895, 2016-17.) According to appellant[32/] this 1968 Grand Jury also included one "Spanish-surnamed Mexican American." (App. Op. Br. pp. 507-08.)

At the conclusion of the hearings on the foregoing issues the trial court denied appellant's motion to quash, finding that the grand jurors and the petit jurors were selected in a constitutional manner and that the petit jury list "is selected from every precinct in this entire county by numbers, so that the Court finds no exclusion of any ethnic, psychological or economic groups." (Rep. Tr. pp. 461-64, 2164.)

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32/ Relying on the exhibits in the Castro and Montez cases.

Appellant complains of the alleged discrimination against Mexican-Americans in the selection of the grand and petit jurors, claiming that such discrimination violated his right to a fair accusation and trial. However, with reference to the purported exclusion of Mexican-Americans, it is well settled that appellant may not found a claim of this nature upon the exclusion of minorities of which he is not a member.

People v. White, 43 Cal. 2d 740, 753, cert. denied, 350 U.S. 875;

Ganz v. Justice Court, 273 Cal. App. 2d 612, 619-20.

See also Eubanks v. Louisiana, 356 U.S. 584, 585; Fay v. New York, 332 U.S. 261, 287.

Whatever disparity there might be between the proportion of minorities on the 1968 grand jury, as compared to their proportion of the general population, and such disparity was at best negligible, it could hardly amount to the degree of gross, invidious discrimination that would constitute denial of appellant's constitutional rights. It is clear from those cases, discussed below, which have considered the issue at bar, that appellant has not made a prima

facie showing of discrimination, let alone the required demonstration of purposeful, systematic exclusion of any segment of the population.

The same is true with respect to appellant's attack on the composition of the petit jury. Significantly, he failed at trial to offer any figures as to the racial makeup of petit jury panels in the county and on appeal ignores the known composition of the particular jury which tried him.

Court's Exhibit 3,[33/] an analysis of the backgrounds of the petit jurors and six alternate jurors chosen to serve in the present case, reflects a remarkably broad racial spectrum on the part of the trier of fact in the case at bar. By race, they are listed as one Negro, two Mexican-Americans, four "other Latin," one "Spanish Irish," nine "German-English-Scotch-Irish," and one "Hebrew."

It is well settled that there need be no exact correlation between the community's makeup and that of the grand or petit jury. Carter v.

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33/ This exhibit is part of the superior court file in the present case. (See Cl. Tr. p. 566; Rep. Tr. pp. 8948-50.)

Jury Commission, 396 U.S. 320, 339; People v. White, supra, 43 Cal. 2d 740, 749. A defendant is not entitled to have a person of his own race, or of any particular race, on the jury. People v. Hines, 12 Cal. 2d 535, 539; People v. Hayes, 276 Cal. App. 2d 528, 533. "Obviously the number of races and nationalities appearing in the ancestry of our citizens would make it impossible to meet a requirement of proportional representation." Cassell v. Texas, supra, 339 U.S. 282, 286-87. Only a substantial disparity over a period of time between a group's percentage on juries and its percentage of the eligible population is prima facie evidence of discrimination, shifting to the prosecution the burden of justifying the discrepancy. Turner v. Fouche, 396 U.S. 346, 359-60; Whitus v. Georgia, 385 U.S. 545, 550-52; People v. Newton, supra, 8 Cal. App. 3d 359, 390. In Swain v. Alabama, 380 U.S. 202, 205, 208-09, the disparity held permissible was 10-15% versus 26%; in People v. Newton, supra at 389-90, it was 7.5% versus 12.4%.

See also Cassell v. Texas, supra, 339 U.S. 282, 284-86.

It is an obvious matter of everyday courtroom

reality that

> ". . . no matter what the race of the defendant, he bears the risk that no racial component, presumably favorable to him, will appear on the jury that tries him. . . . Those finally chosen may have no minority representation as a result of the operation of chance, challenges for cause, and peremptory challenges."
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> Carter v. Jury Commission, supra, 396 U.S. 320, 343 (Douglas, J., dissenting).
>
> See also Williams v. Florida, 399 U.S. 78, 102.

Yet appellant, despite the remarkable fact of having had a fellow Arab on the grand jury that indicted him, in addition to members of other racial and ethnic minorities on the grand jury and on the petit jury that tried him, claims that he was entitled to something still more.

Not only has appellant failed to demonstrate any discriminatory disparity between the number of grand and petit jurors selected from

minority groups and their number among the population at large, but his attacks on the method of selection also fall wide of the mark of invidious discrimination.

Appellant's allegation of socio-economic discrimination is founded primarily on the selection of grand jury nominees by recommendation of the judges of the superior court and selection of petit jury panels from the records of the Registrar of Voters. Respondent submits that these procedures speak for themselves; their fairness and practicality are self-evident and almost by definition preclude the required showing of purposeful, systematic discrimination.

See Fay v. New York, supra, 332 U.S. 261, 273-77;

People v. Gibbs, 12 Cal. App. 3d 526, 538-39;

People v. Newton, supra, 8 Cal. App. 3d 359, 388-90;

Ganz v. Justice Court, supra, 237 Cal. App. 2d 612, 621;

People v. Teitelbaum, 163 Cal. App. 2d 184, 201-04, appeal dismissed, 359 U.S. 206.

Moreover, "[i]t would require large assumptions to

say that one's present economic status, in a society as fluid as ours, determines his outlook in the trial of cases."[34/]

Fay v. New York, supra at 292.

Appellant's authorities likewise do not support his contention that it is unconstitutional or unlawful for a superior court judge to exercise the function of nominating grand jurors. (App. Op. Br. pp. 534-37.)

With regard to the selection of petit jurors from the voting lists, appellant has failed to make the required showing of abuse of discretion on the part of the jury commissioner. People v. Hess, 104 Cal. App. 2d 642, 669, appeal dismissed, 342 U.S. 880. Moreover, particularly insofar as the selection of the petit jurors is concerned, appellant has failed to suggest any workable alternatives. Id.,

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34/ "Were this true, an extremely rich man could rarely have a fair trial, for his class is not often found sitting on juries." Fay v. New York, supra at 292. If wage earners cannot afford to sit on juries (unlike the unemployed), neither can doctors, lawyers, or other busy professional people from the higher socio-economic strata which appellant finds overrepresented on grand and petit juries.

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Instead, to support his attack on the petit jury selection process, appellant relies substantially on the "common knowledge" that "non-voters are not merely a cross section of the community, but . . . are composed of a high percentage of racial and cultural minorities and economically deprived persons." (App. Op. Br. p. 483.) Yet this is not common knowledge, nor does appellant's surmise have any solid foundation in fact. One could just as readily speculate that a sizable portion of the county's non-voters are well-educated young persons of voting age who are apathetic toward the choices afforded by our political system.

The foregoing flights by appellant into the realm of speculation are characteristic of his attempt to build the requisite factual foundation for his claim of invidious discrimination. Appellant's argument is plagued by references to matters outside the record for which, moreover, no citation of authority is given. (App. Op. Br. pp. 487-88, 490-92.) Other assertions, cross-referenced to the exhibits and transcripts in the Castro and Montez

cases, are blatantly conclusionary, e.g., the asserted fact that "Spanish-surnamed Mexican Americans are victimized as a class by discrimination." (App. Op. Br. p. 501.) Some of appellant's assertions are plainly self-contradictory, e.g., his characterization of Pasadena as an "over-represented" "upper class district" "containing comparatively slight ethnic minority subgroups" (App. Op. Br. p. 512), while listing that city as comprising 19.9% "ethnic minorities" according to the 1960 census. (App. Op. Br. p. 511.)

What appellant again ignores is evidence of the varied background of the petit jury in his own case. Court's Exhibit 3 (see Cl. Tr. p. 566; Rep. Tr. pp. 8948-50) reflects in this respect educational backgrounds ranging from a Ph.D. to a high-school drop-out, and occupations including blue-collar and white-collar workers, teacher, housewife, and retired. Almost every geographical area of the county is represented among the jurors' places of residence.

In any event, even if the systems of grand and petit jury selection resulted in jurors of above average intelligence and education, this would not in itself be indicative of discrimination.

(Nor could this be said to prejudice appellant in view of his own superior intellectual and educational background.) It is well settled that "[t]he States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character." (Footnotes omitted.)

Carter v. Jury Commission, supra, 396 U.S. 320, 332-33.

As for the purported discriminatory exclusion of persons of appellant's age group from juries (appellant was 24 years of age at the time of trial), this assertion of discrimination remains unproved and in any event would be inconsequential in view of the United States Supreme Court's approval of statutes fixing the minimum age qualification for jurors at 25.

Carter v. Jury Commission, supra at 333.

Respondent submits that appellant has failed to make a prima facie showing that either the particular grand jury that indicted him, or the particular petit jury that tried him, was selected in a purposefully, systematically discriminatory manner.

People v. Newton, supra, 8 Cal. App. 3d 359, 388-91.

See also People v. Evans, 16 Cal. App. 3d 510, 519;

People v. Lynch, 14 Cal. App. 3d 602, 605;

People v. Superior Court, supra, 13 Cal. App. 3d 672, 681;

People v. Gibbs, supra, 12 Cal. App. 3d 526, 538-39;

People v. Cohen, 12 Cal. App. 3d 298, 306-12;

People v. Conley, 268 Cal. App. 2d 47, 59-60;

Zelechower v. Younger, 424 F.2d 1256, 1258-59 (9th Cir 1970).

If anything, the record establishes the absence of unconstitutional discrimination in the system of grand and petit jury selection in Los Angeles County. The indicated testimony even reflects affirmative efforts to obtain jurors from minority groups.

Cf. Cassell v. Texas, supra, 339 U.S. 282, 289-90;

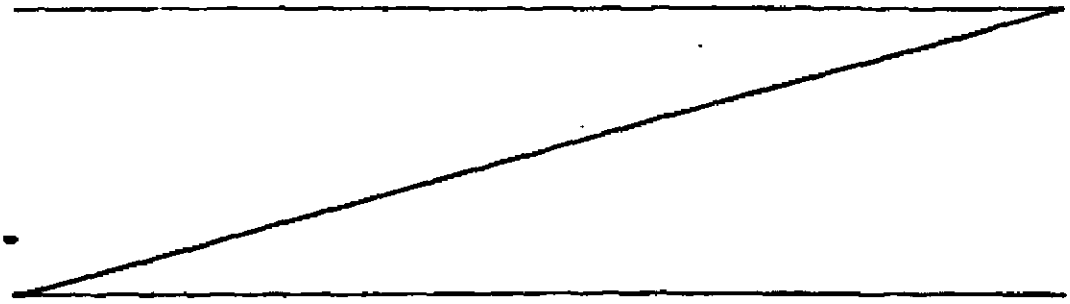
Smith v. Texas, 311 U.S. 128, 131-32.

Even were appellant able to establish the existence of a pattern of disparities of a socio-economic and racial nature between selected jurors

and the general population, his attack on the methods and results of the selection processes would fail in the absence of any proof of purposeful, systematic exclusion.

As this Court held in People v. Schader, 71 Cal. 2d 761:

> "We cannot accept defendant's contention that he suffered violation of his Sixth Amendment right to be tried by a jury of his peers in that members of the jury panel came predominantly from 'high social, economic and educational strata of society.' . . . [Defendant] does not show that the composition of the panel resulted from 'intentional, systematic discrimination against persons of defendant's . . . economic status. . . .' (People v. Carter (1961) 56 Cal.2d 549, 569 . . . .)" Id., 784.



VI

APPELLANT WAS NOT DEPRIVED OF A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO HOLD AN EVIDENTIARY HEARING ON THE ISSUE WHETHER THE EXCLUSION OF JURORS OPPOSED TO CAPITAL PUNISHMENT RESULTS IN AN UNREPRESENTATIVE JURY AT THE GUILT PHASE

Appellant contends that

> "the trial court's refusal to hold an evidentiary hearing and allow the testimony of Dr. Hans Zeisel, Professor of Law and Sociology, University of Chicago School of Law, in order to present evidence on whether 'the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction,' deprived appellant of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution." (App. Op. Br. p. 539; see Rep. Tr. p. 8969.)

The United States Supreme Court rejected this argument in Witherspoon v. Illinois, 391 U.S. 510, holding,

"We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. . . ." Id., 517-18.

The court did, however, leave open the possibility that such a showing might be made in some future case. Id., 520(n.18).

This Court, subsequent to Witherspoon and several months prior to appellant's trial, denied the petitioners' motion for an evidentiary hearing regarding the foregoing claim in In re Anderson, supra, 69 Cal. 2d 613, noting that the pending studies were of a "'sociological or psychological nature'" and that therefore the "'prospect is remote'" that pending studies "'will yield views of human behavior of such incontestable, eternal truth that existing constitutional doctrines will have to retreat before them. Such studies hold too little promise to warrant what would amount to an indeterminate stay of the judicial process in a critical area.'" Id., 621.

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Respondent would add moreover that by their very nature as sociological assertions, appellant's arguments would more properly be directed to the Legislature than to the courts.

Significantly, the evidence proffered by appellant was before the United States Supreme Court in Witherspoon and was rejected as insufficient to establish the point presently urged. Appellant's offer of proof was that "the testimony of this witness Zeisel would be in substance as is set forth in the document that I now hold in my hand . . . . The document is entitled, "'Some Data on Juror Attitudes Toward Capital Punishment."'" (Rep. Tr. p. 8970.) The described study was marked as Defendant's Exhibit VV for identification. (Rep. Tr. p. 8971.) At page vi of the Introduction to the study, it is stated that an earlier draft "was used by defense counsel in their briefs in Witherspoon v. Illinois and Bumper v. North Carolina, both now awaiting hearing in the United States Supreme Court." At page vii it is stated that the study "has been expedited in its publication in the hope that it may prove useful to the litigants in the two Supreme Court cases referred to." Moreover the study's

references, perhaps somewhat out-of-date, are to California Polls and Gallup Polls of 1960, 1965, and 1966, and a California Poll of 1967. (Exh. VV, pp. 12, 14-15, 17, 21-23.)

See Witherspoon v. Illinois, supra at 517(n.10).

Respondent submits that the passing of time has not endowed the foregoing material with any more persuasiveness than it had in 1968, when its conclusions were rejected by the United States Supreme Court in Witherspoon.

See also Bumper v. North Carolina, supra, 391 U.S. 543, 545;

People v. Terry, 2 Cal. 3d 362, 382;

In re Eli, 71 Cal. 2d 214, 218, cert. denied, 396 U.S. 1020;

In re Arguello, 71 Cal. 2d 13, 16-17;

People v. Beivelman, 70 Cal. 2d 60, 78-80;

People v. Gonzales, 66 Cal. 2d 482, 498-99;

People v. Nicolaus, supra, 65 Cal. 2d 866, 882.

VII

APPELLANT'S PUNISHMENT WAS NOT FIXED AT DEATH BY A JURY FROM WHICH PROSPECTIVE JURORS WERE IMPROPERLY EXCLUDED BECAUSE OF THEIR VIEWS ON CAPITAL PUNISHMENT

Appellant contends that he is entitled to a new trial on the matter of penalty because his punishment was fixed at death by a jury from which prospective jurors were improperly excluded because of their views on capital punishment. Appellant bases his claim of error on the trial court's excusal for cause of one prospective juror and five prospective alternate jurors[35/] in alleged violation of the principles set forth in Witherspoon v. Illinois, supra, 391 U.S. 510, 522-23 (App. Op. Br. pp. 553, 555-56), and on the "prosecution's use of peremptory challenges to remove veniremen who under Witherspoon would be improperly excused for cause." (App. Op. Br. p. 570.)

Respondent submits that examination of the

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35/ The excusal of alternates must be considered since two alternates ultimately served on the jury which convicted appellant and fixed his punishment. (Rep. Tr. pp. 7369-70, 8719-20, 8739, 8840-41.) See People v. Bandhauer, 1 Cal. 3d 609, 617-18.

voir dire of the prospective juror and alternates in question establishes that appellant's contentions are without merit.

Prospective Juror Alvidrez was asked, "Are you telling me that it is impossible for you to think of any set of facts that would, in accordance with your conscience, enable you to vote for a guilty verdict wherein you knew there was a possibility that a death verdict might follow?" She responded, "A guilty verdict, yes, a penalty, no." Asked, "But you could not vote for a death penalty in the penalty phase of a trial?", she responded that she "could not." She responded further that she could "conceive of no set of facts" enabling her to do so and that "there is no possible crime of murder where [she] could ever vote for a verdict of death" "under any circumstances at all."[36/]

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36/ The five prospective alternates likewise were properly excluded under Witherspoon. Prospective alternate Lewis would be unable to find a defendant guilty even if the evidence justified a finding of guilt. She would "automatically refuse to impose" the death penalty "regardless of any evidence that might be developed during the trial." (Rep. Tr. pp. 2495-97.) Prospective alternate Katrenich "automatically" could not "inflict the death penalty" "[r]egardless of the evidence" and under "no set of facts and under no circumstances, no matter how horrible." (Rep. Tr. p. 2532.) Prospective alternate Lipson stated he

(Rep. Tr. pp. 903-05.)

The trial court, in the course of jury voir dire conducted several months after Witherspoon, properly excused the juror and prospective jurors in question after they "made unmistakably clear . . . that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial

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would "automatically refuse to vote for a death penalty, . . . notwithstanding the evidence." He could "conceive of no case, no set of facts . . . so terrible" as to enable him to vote for the death penalty. (Rep. Tr. p. 2696.) Prospective alternate Hart stated her "strong reservations against the death penalty" and noted that she therefore could not vote for a guilty verdict. Then asked, "No matter how terrible the facts are, how horrendous they are, how awful they are, you could not under any circumstances vote for guilt?", she responded, "I have strong convictions." (Rep. Tr. pp. 2767-68.) Prospective alternate Acuma was asked, "do you entertain such conscientious opinions concerning the death penalty that you would be unable to find a defendant guilty if the evidence should justify such a finding of guilty." He replied, "I wouldn't be able to, with a clear conscience, to find a guilty verdict," "no matter what the facts were, no matter how terrible, how horrendous." Mr. Acuma then stated that he could sit on the first phase of the trial but that he did not "believe" there were any "circumstances under which [he] could conceivably vote the death penalty." (Rep. Tr. pp. 2788-89.)

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of the case before them." (Emphasis by the court.)

Witherspoon v. Illinois, supra at 522(n.21).

See also People v. Terry, supra, 2 Cal. 3d 362, 379-80;

People v. Floyd, 1 Cal. 3d 694, 723-27;

People v. Miller, 71 Cal. 2d 459, 468-71;

People v. Mabry, 71 Cal. 2d 430, 444-45;

People v. Tolbert, 70 Cal. 2d 790, 808-11;

People v. Hill, 70 Cal. 2d 678, 701 & n.3.

Appellant's contention that the prosecution was not free to exercise its peremptory challenges as it saw fit is clearly without merit. This Court will not "engage in conjecture regarding the prosecutor's reasons for exercising some of his peremptory challenges to excuse some jurors who had reservations concerning the death penalty."

People v. Floyd, supra, 1 Cal. 3d 694, 727.

The United States Supreme Court also expressed a similar conclusion in Swain v. Alabama, supra, 380 U.S. 202, refusing to

". . . hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any

particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the Court. . . ." Id., 222. See also Groppi v. Wisconsin, 400 U.S. 505, 510.

## VIII

### THE TRIAL COURT DID NOT ERR IN EXCLUDING, AT THE PENALTY PHASE, TESTIMONY CONCERNING THE ARAB-ISRAELI CONFLICT

Appellant contends that the trial court erred in excluding testimony "relative to the social, historical, economic, and political dimensions of the Arab-Israeli conflict during the Sirhan childhood in Palestine." (App. Op. Br. p. 636; see Rep. Tr. pp. 8856-58, 8873-75.)

Respondent submits that the offered evidence was totally irrelevant to the jury's determination of penalty in the present proceedings because, as defense counsel conceded at trial, it in no way involved appellant's personal experience. (Rep. Tr. p. 8874.) To be contrasted is the abundant evidence of appellant's life in Jerusalem which was put in evidence by

the defense at the guilt phase and never controverted by the prosecution.

In an analogous situation this Court in People v. Nye, 71 Cal. 2d 356, upheld the trial court's refusal to admit in evidence a motion picture relating to the defendant's earlier years. The Court held,

> "Had the film been even to a partial degree an accurate portrayal of defendant's adolescent years, the trial court undoubtedly would have allowed it to be shown to the jury. However, . . . the film does not even attempt to portray defendant's activities at the ranch. Rather, it was a staged and contrived presentation, in which . . . defendant . . . plays the part of a boy at the ranch . . . . Under the circumstances, it was irrelevant and immaterial on the issue of penalty, and the trial court properly excluded it." Id., 371-72.

The Court in Nye "noted that the scope of admissible evidence under section 190.1 of the Penal Code is not so broad as to allow the introduction into evidence of anything no matter how

remote its relation to the defendant's background." Id., 372. The Court also upheld the exclusion of a portion of a court-martial report as inadmissible hearsay. Id.

See also People v. Mitchell, 63 Cal. 2d 805, 814-15, cert. denied, 384 U.S. 1007.

Respondent submits that the aforementioned evidence proffered by the defense at the penalty proceedings below was properly excluded as irrelevant and immaterial on the sole issue before the jury, the proper punishment to be imposed.[37/]

IX

THE ABSENCE OF FIXED STANDARDS TO GUIDE THE JURY ON THE MATTER OF PENALTY IS NOT UNCONSTITUTIONAL

Appellant contends that the absence of fixed standards to guide the jury in deciding between the

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37/ The trial court's equitable position in ruling on the relevance of proffered evidence is illustrated by the court's also excluding from evidence (at the guilt phase) the prosecution's motion picture of Senator Kennedy's final speech delivered moments before the Senator was assassinated by appellant. (Rep. Tr. pp. 7355-61.)

death penalty and life imprisonment denied appellant due process of law and equal protection of the laws under the Fourteenth Amendment. (App. Op. Br. p. 607.)

The argument advanced by appellant was rejected by this Court in In re Anderson, supra, 69 Cal. 2d 613, 621-28, and this year by the United States Supreme Court in McGautha v. California, ___ U.S. ___, 39 U.S.L.W. ____ (decided May 3, 1971).

X

THE DEATH PENALTY IS NEITHER CRUEL NOR UNUSUAL PUNISHMENT

Appellant contends that "the death penalty is so fortuitous and unrelated to culpability that it offends the Eighth Amendment's proscription of cruel and unusual punishment." (App. Op. Br. p. 635.)

This argument has been rejected repeatedly by the courts, and appellant has advanced no argument or authority which could cause this Court to abandon its prior pronouncements on the subject.

In re Anderson, supra, 69 Cal. 2d 613, 629-32.

See also Trop v. Dulles, 356 U.S. 86, 99;

In re Kemmler, 136 U.S. 436, 447.

XI

THIS COURT SHOULD REFUSE, AS IT HAS IN ALL PAST CASES, TO RE-DETERMINE THE PUNISHMENT IN A CAPITAL CASE

Appellant contends that this Court should substitute its judgment for that of the trier of fact and reduce his punishment to life imprisonment. (App. Op. Br. p. 411.)

"This court has uniformly rejected requests to reduce the penalty from death to life imprisonment," People v. Lookadoo, 66 Cal. 2d 307, 327, holding that "it has no power to substitute its judgment as to choice of penalty for that of the trier of fact." In re Anderson, supra, 69 Cal. 2d 613, 623.

Respondent submits that the aggravated circumstances of the present offense, involving as it does a calculated political assassination, lack of remorse on appellant's part, and appellant's superior educational and intellectual background, hardly suggest this case as a vehicle for abandoning this Court's commendable policy of deference to the decision of the trier of fact on the matter of punishment in a capital case. It is difficult to imagine a less deserving object of mercy than an assassin who has expressed his desire to be

"recorded by history" as the individual who "triggered" World War III. (Rep. Tr. pp. 4987-90.) The jury as trier of fact, and the trial court on motion for new trial and for reduction of punishment (Rep. Tr. p. 9048), determined that justice would best be served by imposition of the death penalty in this case, and respondent submits that there is no reason to disturb this determination.

## CONCLUSION

For the foregoing reasons the judgment should be affirmed in its entirety.

Respectfully submitted,

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